104

(1)

Supreme Court, U.S.
FILED

08-210 AUG 15 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

Supreme Court of the United States

E.I. DUPONT DE NEMOURS & CO.,
GENERAL ELECTRIC CO., AND
UNC NUCLEAR INDUSTRIES, INC.,

Petitioners,

v.

STEVEN STANTON, GLORIA WISE,
WANDA BUCKNER, SHIRLEY CARLISLE, AND
KATHRYN JANELLE GOLDBLOOM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN VAN WART, P.C.
TIMOTHY A. DUFFY
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
JEFFREY B. WALL
KIRKLAND & ELLIS LLP
655 Fifteenth St., NW
Washington, DC 20005
(202) 879-5000

August 15, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by holding that the federal common law government-contractor defense does not apply as a matter of law to claims under the Price-Anderson Act, which provides the exclusive cause of action for all injuries allegedly caused by nuclear emissions.

2. Whether the Ninth Circuit erred by holding that petitioners may be held strictly liable under the Price-Anderson Act for federally authorized nuclear emissions.

3. Whether the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners hereby certify as follows:

1. Petitioner E.I. DuPont de Nemours & Co. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

2. Petitioner General Electric Co. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

3. Petitioner UNC Nuclear Industries, Inc. has four parent companies: GE Engine Services UNC Holdings, Inc. II, GE Engine Services UNC Holdings I, GE Engine Services-Miami, Inc., and petitioner General Electric Co. No publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

PERTINENT STATUTORY PROVISIONS 5

STATEMENT OF THE CASE 6

A. Background 6

B. Proceedings Below 12

1. District Court Proceedings 12

2. Ninth Circuit Proceedings 14

REASONS FOR GRANTING THE WRIT 16

I. The Ninth Circuit Erred By Holding That The Federal Common Law Government-Contractor Defense Does Not Apply As A Matter Of Law To Claims Under The Price-Anderson Act. 16

II. The Ninth Circuit Erred By Holding That Petitioners May Be Held Strictly Liable Under The Price-Anderson Act For Federally Authorized Nuclear Emissions. 26

III. The Ninth Circuit Erred By Holding That A Putative Class Member Who Files An Individual Lawsuit While A Motion For Class Certification Is Pending Is Nonetheless Entitled To Class Action Tolling 29

CONCLUSION 34

APPENDIX CONTENTS

Ninth Circuit Opinion,
August 14, 2007,
as amended by orders of April 4 & July 29, 2008
(deletions marked by ~~strikeout~~;
additions marked by shading) 1a

Ninth Circuit Order Amending Opinion and Denying Petition for Rehearing *En Banc*,
April 4, 2008 ..... 61a

Ninth Circuit Order Amending Opinion,
July 29, 2008 ..... 67a

District Court Order Granting Plaintiffs' Motion to Strike Government Contractor Defense,
March 30, 2004 ..... 68a

District Court Order Granting Plaintiffs' Motion for Summary Judgment on Strict Liability,
November 3, 2004 ..... 87a

District Court Order Denying Defendants' Motion for Reconsideration on Strict Liability,
March 15, 2005 ..... 119a

District Court Order Denying Defendants' Motion for Summary Judgment on Statute of Limitations,
July 22, 2004 ..... 135a

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. United States,
816 F.2d 1417 (10th Cir. 1987) 17

American Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974)..... 15, 29-34

Boyle v. United Techs. Corp.,
487 U.S. 500 (1988).....2, 17-22, 24

Calvello v. Electronic Data Sys.,
No. 00-CV-800, 2004 WL 941809
(W.D.N.Y. Apr. 15, 2004).....31

Chazen v. Deloitte & Touche, LLP,
247 F. Supp. 2d 1259 (N.D. Ala.),
aff'd in part & vacated in part on other grounds, 88 Fed.Appx. 390 (11th Cir. 2003)
(*per curiam*).....31

Chemco, Inc. v. Stone, McGuire & Benjamin,
No. 91-C-5041, 1992 WL 188417
(N.D. Ill. July 29, 1992).....32

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981).....27

Chinn v. Giant Food, Inc.,
100 F. Supp. 2d 331 (D. Md. 2000).....31

County of Oneida, N.Y. v.
Oneida Indian Nation of N.Y. State,
470 U.S. 226 (1985).....21

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983).....30

Fezzani v. Bear, Stearns & Co.,
384 F. Supp. 2d 618 (S.D.N.Y. 2004) 31, 33

Glater v. Eli Lilly & Co.,
712 F.2d 735 (1st Cir. 1983)..... 16, 29-30

Hubbard v. Correctional Med. Servs., Inc.,
No. 04-3412, 2008 WL 2945988
(D.N.J. July 30, 2008).....31

In re Brand Name Prescription Drugs Antitrust Litig.,
No. 94-C-897, 1998 WL 474146
(N.D. Ill. Aug. 6, 1998).....32

In re Ciprofloxacin Hydrochloride Antitrust Litig.,
261 F. Supp. 2d 188 (E.D.N.Y. 2003).....31

In re Consol. U.S. Atmospheric Testing Litig.,
820 F.2d 982 (9th Cir. 1987) 16

In re Enron Corp. Sec. Litig.,
465 F. Supp. 2d 687 (S.D. Tex. 2006).....31

In re Fed. Nat'l Mortgage Ass'n Sec. Litig.,
503 F. Supp. 2d 25 (D.D.C. 2007).....31

In re Heritage Bond Litig.,
289 F. Supp. 2d 1132 (C.D. Cal. 2003).....31, 33

In re Katrina Canal Breaches Consol. Litig.,
No. 05-4182, 2008 WL 2692674
(E.D. La. July 2, 2008).....32, 34

In re TMI Litig. Cases Consol. II,
940 F.2d 832 (3d Cir. 1991).....24

In re WorldCom Sec. Litig.,
496 F.3d 245 (2d Cir. 2007).....3, 16, 30

In re WorldCom, Inc. Sec. Litig.,
294 F. Supp. 2d 431 (S.D.N.Y. 2003),
vacated, 496 F.3d 245 (2d Cir. 2007) 31

Irrer v. Milacron, Inc.,
No. 04-72898, 2006 WL 2669197
(E.D. Mich. Sept. 18, 2006).....31

Koutsoubos v. Boeing Vertol, Div. of Boeing Co.,
755 F.2d 352 (3d Cir. 1985).....20

Kozlowski v. Sheahan,
No. Civ.A. 05-C-5593,
2005 WL 3436394 (N.D. Ill. Dec. 12, 2005) ...31

Lehman v. UPS, Inc.,
443 F. Supp. 2d 1146 (W.D. Mo. 2006) 32

McKay v. Rockwell Int'l Corp.,
704 F.2d 444 (9th Cir. 1983) 17-18, 20

McMillian v. AMC Mortgage Servs., Inc.,
No. 07-773, __ F. Supp. 2d __,
2008 WL 2357236 (S.D. Ala. June 10, 2008) .31

Nielsen v. George Diamond Vogel Paint Co.,
892 F.2d 1450 (9th Cir. 1990) 17-18

Nieman v. NLO, Inc.,
108 F.3d 1546 (6th Cir. 1997) 26

O'Conner v. Commonwealth Edison Co.,
13 F.3d 1090, 1099 (7th Cir. 1994) 26

Pacific Gas & Elec. Co. v.
State Energy Res. Conservation & Dev.
Comm'n, 461 U.S. 190 (1983).....26

Primavera Familienstifung v. Askin,
130 F. Supp. 2d 450 (S.D.N.Y. 2001) 31

Prohaska v. Sofamor, S.N.C.,
138 F. Supp. 2d 422 (W.D.N.Y. 2001) 31

Pulley v. Burlington N., Inc.,
568 F. Supp. 1177 (D. Minn. 1983) 32

Puttick v. America Online, Inc.,
Nos. MDL 1500, 05-Civ.-5748,
2007 WL 1522612 (S.D.N.Y. May 23, 2007) ..31

Radio Station WOW v. Johnson,
326 U.S. 120 (1945).....27

Rahr v. Grant Thornton LLP,
142 F. Supp. 2d 793 (N.D. Tex. 2000) 31, 33

Roberts v. Florida Power & Light Co.,
146 F.3d 1305 (11th Cir. 1998) (*per curiam*) .26

Rochford v. Joyce,
755 F. Supp. 1423 (N.D. Ill. 1990) 32

Schimmer v. State Farm Mut. Auto. Ins. Co.,
No. 05-cv-2513, 2006 WL 2361810
(D. Colo. Aug. 15, 2006).....32

Shaffer v. Combined Ins. Co. of Am.,
No. 02-C-1774, 2003 WL 22715818
(N.D. Ill. Nov. 18, 2003).....31

Shriners Hosps. for Children v.
Qwest Commc'ns Int'l, Inc.,
No. 04-cv-781, 2007 WL 2801494
(D. Colo. Sept. 24, 2007) 32, 34

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984).....26

Snell v. Bell Helicopter Textron, Inc.,
107 F.3d 744 (9th Cir. 1997) 18

Stutz v. Minnesota Mining & Mfg. Co.,
947 F. Supp. 399 (S.D. Ind. 1996) 32

Tozer v. LTV Corp.,
792 F.2d 403 (4th Cir. 1986) 20

United States v. Orleans,
425 U.S. 807 (1976).....22

United States v. Texas,
507 U.S. 529 (1993).....21, 23

Wachovia Bank & Trust Co. v. National Student Mktg. Corp.,
650 F.2d 342 (D.C. Cir. 1980)..... 29-30

Wachovia Bank & Trust Co., N.A. v. National Student Mktg. Corp.,
461 F. Supp. 999 (D.D.C. 1978),
aff'd in relevant part,
650 F.2d 342 (D.C. Cir. 1980).....32

Wanad v. City of New York,
No. 75 Civ. 6203, 1999 WL 608772
(S.D.N.Y. Aug. 12, 1999).....32

Wyser-Pratte Mgmt. Co. v. Telxon Corp.,
413 F.3d 553 (6th Cir. 2005) 3, 15-16, 29-30

Yearsley v. W.A. Ross Constr. Co.,
309 U.S. 18 (1940) 17, 19-20, 27

Statutes and Regulations

28 U.S.C. § 1254(1) 5

28 U.S.C. § 2680(a) 16, 18

42 U.S.C. § 2014(hh) 5, 24

42 U.S.C. § 2014(q) 5

42 U.S.C. § 2014(w) 5

42 U.S.C. § 2210 ..... 2, 5
42 U.S.C. § 2210(a) 24
42 U.S.C. § 2210(b) 24
42 U.S.C. § 2210(c) 24
42 U.S.C. § 2210(d)(1)(B)(i)(II) 22
42 U.S.C. § 2210(d)(7) 6, 22
42 U.S.C. § 2210(n) 6
42 U.S.C. § 2210(n)(1) 22
Fed. R. Civ. P. 12(f) 12
Fed. R. Civ. P. 23 30
Fed. R. Civ. P. 54(b) 14
Wash. Rev. Code § 4.16.080(2) 33

INTRODUCTION

This case turns on the simple point that courts are not in the business of awarding damages for injuries allegedly arising from the Government's discretionary military decisions. Here, as part of the Manhattan Project at the height of World War II, the U.S. Government established a facility in Hanford, Washington, to produce plutonium for the atomic bomb, and effectively conscripted private contractors to operate that facility. The Government made the critical discretionary decisions with respect to the operation of that facility generally, and with respect to the conduct challenged in these lawsuits—the release of radioactive iodine (I-131)—specifically. Essentially, the Government was forced to balance the potential health effects of I-131 emissions, which were believed to be negligible, against the military imperative of producing as much plutonium as possible as quickly as possible. Whatever one might think, with the benefit of more than half a century of hindsight, about the particular balance struck by the Government, the fact remains that the decisions striking that balance lie at the core of the Government's military discretion.

Given that the Government has not waived its sovereign immunity for such discretionary decisions, plaintiffs cannot sue the Government for injuries allegedly caused by those decisions. Respondents thus sought to circumvent the Government's sovereign immunity by suing petitioners, the private contractors hired by the Government to implement its discretionary military decisions at Hanford. No matter how these lawsuits are captioned, however, there is no escaping the fact that they represent a

collateral attack on the Government's discretionary military decisionmaking. If ever any lawsuits were tailor-made for the government-contractor defense, these are the ones.

The Ninth Circuit, however, held that the defense does not apply as a matter of law to any claims arising under the Price-Anderson Act (PAA or Act), 42 U.S.C. § 2210 *et seq.*, which provides the exclusive cause of action for all injuries allegedly caused by nuclear emissions. According to the Ninth Circuit, this Court made up the government-contractor defense out of whole cloth in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), so that the defense was not part of the established common law background against which Congress enacted the PAA amendments at issue here shortly after *Boyle*. The Ninth Circuit thereby opened up a huge loophole whereby plaintiffs cannot sue the Government *directly* for injuries allegedly caused by the Government's discretionary decisions involving nuclear emissions, but can sue the Government *indirectly* for such injuries by suing the private contractors hired (and indemnified) by the Government to implement those decisions.

And the Ninth Circuit only exacerbated that error by affirming the district court's decision to hold petitioners *strictly* liable under the Act, thereby precluding them from defending themselves on the grounds, among others, that the challenged emissions were federally authorized and their operation of Hanford was not negligent. According to the Ninth Circuit, only federal nuclear emissions standards duly promulgated under the Administrative Procedure Act (which was not even

enacted when the emissions at issue began) preempt state standards of care otherwise incorporated into the PAA. Thus, although the Ninth Circuit recognized that the emissions standards here were established under the aegis of the United States Army, the court held that compliance with those standards is no defense to liability.

Finally, the Ninth Circuit erred by holding that the pendency of a class certification motion tolls the statute of limitations for all members of the putative class, including those (like respondent Wise) who filed untimely individual actions while that motion was pending. Although the Ninth Circuit originally agreed with the Sixth Circuit that tolling is unwarranted under these circumstances, *see* App. 39-40a (citing *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005)), the court reversed course in response to respondents' petition for rehearing and agreed with the Second Circuit that tolling is warranted under these circumstances, *see* App. 41-42a (citing *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007)). At the very least, this Court's review is warranted to resolve this acknowledged circuit conflict on an important and recurring issue of federal law.

At bottom, the Ninth Circuit stripped petitioners of three key defenses to liability: (1) the government-contractor defense, (2) the federal-standards defense, and (3) the statute-of-limitations defense. The Ninth Circuit is thereby forcing petitioners (and, indirectly, the Government) to defend themselves against thousands of nuclear emissions lawsuits with one hand tied behind their backs. In essence, the Ninth Circuit refused to recognize that these lawsuits

represent an attempt to challenge the Government's discretionary military decisionmaking. The law neither authorizes nor tolerates the imposition of liability (much less strict liability) under these circumstances. Accordingly, this Court should grant review.

OPINIONS BELOW

The Ninth Circuit's decision, as amended on April 4, 2008 and July 29, 2008, is reported at __ F.3d __ and reprinted in the Appendix ("App.") at 1-60a. As thus amended, that decision supersedes the Ninth Circuit's earlier decisions reported at 497 F.3d 1005 and 521 F.3d 1028. The district court's unreported order granting respondents' motion to strike the government-contractor defense is reprinted at App. 68-86a. The district court's order granting respondents' motion for summary judgment on the federal-standards defense is reported at 350 F. Supp. 2d 871, and reprinted at App. 87-118a. The district court's unreported order denying petitioners' motion for reconsideration on the federal-standards defense is reprinted at App. 119-34a. The district court's unreported order denying petitioners' motion for summary judgment on the statute of limitations, and *sua sponte* granting respondents summary judgment on that issue, is reprinted at App. 135-55a.

JURISDICTION

The Ninth Circuit rendered its original decision on August 14, 2007, and amended that decision by orders dated April 4, 2008 and July 29, 2008. App. 1a, 61a, 67a. The Ninth Circuit denied a timely petition for rehearing *en banc* on April 4, 2008. App. 66a. On June 19, 2008, Justice Kennedy granted petitioners' application to extend the time within

which to petition for certiorari until August 15, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The PAA provides in pertinent part:

> The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material ....
>
> 42 U.S.C. § 2014(q)
>
> The term "public liability" means any legal liability arising out of or resulting from a nuclear incident ....
>
> 42 U.S.C. § 2014(w)
>
> The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under [42 U.S.C. § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.
>
> 42 U.S.C. § 2014(hh)

> A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

42 U.S.C. § 2210(d)(7)

> With respect to any extraordinary nuclear occurrence ... which [meets certain conditions,] the [Nuclear Regulatory] Commission or the Secretary [of Energy], as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive ... any issue or defense as to charitable or governmental immunity ....

42 U.S.C. § 2210(n)

STATEMENT OF THE CASE

A. Background

This case arises out of petitioners' work for the U.S. Government during World War II and the early

years of the Cold War. Petitioner DuPont was solicited by the U.S. Army to assist in the war effort by operating a facility in Hanford, Washington that produced plutonium for the atomic bomb under Army specifications. App. 8a, 11a. DuPont agreed to do so for no profit, in return for indemnity from the United States. App. 11a. Thus, DuPont's contract specified that the company "had no experience or special knowledge in the field of this project" and "will depend wholly on data and specifications of the War Department in carrying out the work, and ... therefore cannot assume responsibility for the correctness or adequacy of such data or specifications." CA9 Excerpts of Record ("ER"), No. 05-35866, at 164-65.

For present purposes, the process for producing plutonium at Hanford consisted of three key steps. The first step involved controlled fission of uranium inside a reactor, which created miniscule amounts of plutonium, as well as other fission byproducts (including I-131), inside slugs of uranium metal. *Id.*, at 283. The second step involved storing or "cooling" the uranium slugs discharged from the reactor to allow time for some of the radioactive materials (including I-131, which has a half-life of only eight days) to decay. *Id.* at 283-84. The third step involved dissolving the slugs in acid to separate the plutonium for further processing and thereby also releasing other radioactive byproducts, including I-131. Depending on how long the slugs were stored at the second step (and how much I-131 had therefore decayed), a greater or lesser amount of I-131 was emitted in gaseous form during the third step. *Id.* at 227-28, 284; *see also id.* at 316 ("Longer cooling times could reduce the volume of I-131

emitted."); *id.* ("Given the need for plutonium for atomic weapons the cooling times were often shorter than desirable to reduce I-131 emissions."); App. 12a ("The key to decreasing I-131 emissions was to allow for longer cooling times of the uranium slugs used to produce the plutonium. This strategy, however, often conflicted with the federal government's orders to increase plutonium production.").

I-131 was already well known to scientists and the medical community at that time. In particular, because I-131 concentrates in the human thyroid, it already was being used to diagnose and treat thyroid problems. *See* CA9 ER, at 181-82, 285. Indeed, I-131 was used for medical purposes at levels far beyond those at issue here: for diagnostic purposes, patients were exposed to tens of rads of I-131, and, for treatment purposes, to hundreds or thousands of rads of I-131. *Id.* at 285, 291.[1] Government scientists, on the basis of this medical experience as well as the results of animal studies, set exposure limits at Hanford of one rad per day for the thyroid, which they concluded was well below the level at which any harmful effects from I-131 exposure had been observed. *Id.* at 155-56, 181-82, 285-86; *see also id.* at 409 ("It is not disputed that scientists

---

[1] A "rad" (roentgen absorbed dose) is a measure of the radioactive energy absorbed by the body or a particular organ. Because calculation of a dose of radiation takes into account the mass of tissue exposed, it takes less energy to give an equal dose to a smaller organ. Thus, for example, the energy needed to produce a whole-body dose of 0.1 rads would actually be greater than the energy needed to produce a dose of 1 rad to a smaller organ like the thyroid.

established a safety level of one rad per day for humans."). Based on the one-rad-per-day exposure limit, the Government approved detailed operating instructions that specified particular cooling times for particular power levels and appropriate dissolving conditions. *See id.* at 200-21.

The Hanford facility began producing plutonium in December 1944. *See id.* at 225. In light of the wartime exigency, the Government insisted on producing as much plutonium as possible as quickly as possible to develop an atomic bomb. *See id.* at 229-39. By mid-July 1945, the United States detonated its first atomic bomb at Alamogordo, New Mexico. *See id.* at 235-36. The bomb dropped on Nagasaki, Japan, on August 9, 1945, was made with plutonium produced at Hanford. *See id.* at 239; *see also* App. 11a.

The end of World War II brought only a temporary respite to the Government's push for more plutonium. Although the Government ordered that production should continue, cooling times were extended to 60 days "to reduce radioactivity due to iodine ... which has been detected in sagebrush as far away as Walla Walla." CA9 ER, at 244. Still, however, it did not take long for the Government to want more plutonium than Hanford was then capable of producing: "There was never a time, after the end of the war, when Hanford or DuPont could optionally have chosen to slow production. Production schedules were never optional but were determined by War Department orders." *Id.* at 245.

DuPont's contract had been written to expire at the end of the war. The company, however, agreed to stay on until the Government could find a

replacement firm. *Id.* at 245-51. On September 1, 1946, Hanford operations were transferred from DuPont to General Electric (GE), which (like DuPont) signed a contract whereby the company would earn no profit from its work. *Id.* at 251, 283; *see also* App. 12a.

Plutonium output at Hanford increased exponentially from 1946 to 1948 as the Cold War began and the U.S. Government aimed to establish a stockpile of atomic weapons. On January 2, 1947—two days after the civilian Atomic Energy Commission (AEC) assumed control over the Nation's nuclear weapons program—"the Joint Chiefs of Staff formally advised President Truman that they considered the present supply of atomic weapons not adequate to meet the security requirements of the United States." CA9 ER, at 374 (internal quotation omitted). The AEC soon ordered GE "to make increased plutonium production at Hanford its top priority." *Id.* at 375.

At the same time, GE was seeking permission to increase cooling times from 60 to 90 days, which would have reduced I-131 emissions but also plutonium production. *Id.* at 374; *see also* App. 12a. The AEC denied the request. *See id.* In April and November 1948, GE again sought to increase cooling times—to 125 days—in response to new radiation protection standards recommended by the National Committee on Radiation Protection. CA9 ER, at 379. Again, the AEC denied the request, and specifically rejected the notion that the National Committee's levels were in any way binding absent adoption by the AEC. *Id.*; *see also id.* at 391 (noting the "continual conflict ... between the U.S. Government's

desire to maximize production of plutonium at Hanford, and the contractor's concern with minimizing the impact of ... operations upon the health and safety of Hanford workers and nearby residents").[2] On December 2, 1949, shortly after the Soviet Union detonated its first atomic bomb, the Government directed GE to dissolve a partial batch of uranium slugs that had been cooled for only 15 days as part of an experiment to test monitoring equipment. *See id.* at 364, 385-87. This event—known as the "Green Run" for the "green" or hot metal dissolved—produced the largest quantity of I-131 to be released since the earliest days of wartime production.

By the 1950s, however, I-131 emissions from Hanford were reduced to negligible levels, as the production process was adjusted to allow more cooling time, and technological improvements allowed better filtering of such emissions. Studies have not shown that I-131 emissions from Hanford at any point in the 1940s or 50s caused any harm. In 2002, the Centers for Disease Control released a comprehensive, state-of-the-art epidemiological study, which found *no* increased incidence or risk of any thyroid disease in the population exposed to

---

[2] Indeed, in October 1948, GE actually shut down the facility after some radioactive particles were discovered some 200 miles away. CA9 ER, at 380. This provoked an angry response from the AEC that "in the future no such step was to be taken without consulting the Commission." *Id.* GE was forced to concede "it was ultimately the U.S. government's verdict ... which caused production to be resumed, since '[GE] would not dare to accept such responsibility.'" *Id.*

I-131 from Hanford. *See* CA9 ER, at 417.01-.29; *see also* http://www.cdc.gov/nceh/radiation/hanford/htdsweb/index.htm (last visited August 14, 2008).

B. Proceedings Below

1. District Court Proceedings

Respondents are five individuals who lived "downwind" of the Hanford facility during World War II and the early years of the Cold War, and claim that I-131 emissions from the facility during that period eventually caused them to develop either cancer or thyroid disease. They are among over 2,500 individual plaintiffs who filed (or joined) these lawsuits against petitioners starting in 1990. After lengthy pretrial proceedings not relevant here, the district court (Nielsen, J.) adopted a "bellwether" plan in which twelve plaintiffs would be selected (six by plaintiffs, six by petitioners) to have their claims fully adjudicated.

The bellwether plaintiffs thereafter moved under Fed. R. Civ. P. 12(f) to strike the government-contractor defense. The district court granted the motion, holding that the defense did not apply as a matter of law to any claims arising under the PAA. *See* App. 68-86a.

The bellwether plaintiffs thereafter moved for partial summary judgment on the federal standards defense, arguing that petitioners had engaged in an abnormally dangerous activity, and hence should be held strictly liable for any injuries caused by their conduct under Washington law as incorporated into the PAA. Again, the district court granted the motion, rejecting petitioners' argument that they should be allowed to defend themselves by reference

to their compliance with applicable federal nuclear safety standards. *See* App. 110-16a; *see also* App. 133a.

Finally, petitioners moved for summary judgment with respect to the claims of any plaintiff who did not file within three years of the *later* of (1) February 27, 1986 (the date on which the U.S. Government publicly disclosed detailed documents concerning I-131 emissions from Hanford), or (2) the date on which an individual plaintiff was diagnosed with an injury allegedly caused by I-131 emissions from Hanford. The district court not only denied the motion, but granted the plaintiffs summary judgment on the statute of limitations (even though they had never moved for such relief). *See* App. 135-55a. According to the district court, the applicable three-year statute of limitations was tolled for almost *thirteen years*, from August 6, 1990 (when the first putative class action was filed) until May 30, 2003 (when plaintiffs withdrew any remaining motions for class certification). App. 151-54a.

The district court, however, granted petitioners summary judgment with respect to five of the six bellwether cases chosen by petitioners (a ruling plaintiffs did not appeal), and the final bellwether plaintiff chosen by petitioners voluntarily dismissed her claims, so only the six bellwether cases chosen by plaintiffs proceeded to trial in April 2005. After fourteen days of trial and four days of deliberations, the jury returned verdicts in favor of two of the bellwether plaintiffs (respondents Stanton and Wise), verdicts in petitioners' favor with respect to three other bellwether plaintiffs (respondents Buckner, Carlisle, and Goldbloom), and no verdict

with respect to the final bellwether plaintiff (Rhodes). The jury awarded Stanton $227,508 and Wise $317,251. After the district court entered judgment on the verdicts and certified those judgments for immediate appeal under Fed. R. Civ. P. 54(b), petitioners appealed the judgment in favor of respondents Stanton and Wise.

2. Ninth Circuit Proceedings

The Ninth Circuit (per Schroeder, C.J., joined by Goodwin and Hawkins, JJ.) in relevant part affirmed the judgment in favor of respondents Stanton and Wise. *See* App. 60a. The court originally reversed the judgment in favor of respondent Wise on statute of limitations grounds, *see* App. 39-41a, 60a, but, in response to respondents' petition for rehearing, reversed course and issued a substantially amended decision, *see* App. 41-42a, 60a.

As relevant here, the Ninth Circuit first recognized that "[t]he overarching issue" presented by these cases is the applicability of the federal common law government-contractor defense, App. 18a, and affirmed the district court's conclusion that the defense does not apply as a matter of law to claims under the PAA, *see* App. 18-26a. In particular, the Ninth Circuit held that "Congress did not enact the PAA against a backdrop of well-established common law principles that included the government contractor defense," App. 23a, on the theory this Court had not recognized that defense until a few months before the relevant PAA amendments in 1988.

The Ninth Circuit then agreed with the district court that petitioners could be held strictly liable under the Price-Anderson Act even though they

complied with federal radiation standards. *See* App. 26-29a. The court recognized that, as a general matter, "nuclear operators are not liable unless they breach federally-imposed dose limits." App. 27a; *see also id.* ("Strict liability may not be imposed for I-131 releases within federally-authorized limits, because any federal authorization would preempt state-derived standards of care."). The court declared, however, that the federal emissions standards in effect at Hanford in the 1940s, "although established under the aegis of the United States Army, did not carry the force of law and thus cannot provide the basis for a safe harbor from liability." App. 28a. According to the Ninth Circuit, only formal federal standards duly promulgated under the Administrative Procedure Act (APA)—which did not even exist at the time that the emissions challenged here began—would suffice. *See id.*

The Ninth Circuit finally held that respondents were entitled to class action tolling under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), even in individual actions filed while class certification remained pending. On that issue, the Ninth Circuit reversed course in response to respondents' petition for rehearing. The Ninth Circuit originally accepted petitioners' argument that it made no sense to apply *American Pipe* tolling with respect to plaintiffs, like respondent Wise, who filed individual actions while class certification was pending, because such persons could not reasonably claim to have been relying on the pending class action to vindicate their rights. *See* App. 39-41a. On this point, the Ninth Circuit expressly aligned itself with "[t]he Sixth Circuit, which is the only circuit to have addressed the issue directly." App. 39a (citing *Wyser-Pratte*, 413 F.3d at

569), along with the First Circuit, which "tangentially reached a similar conclusion two decades earlier," *id.* (citing *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983)), and "countless federal district courts," *id.* (citing cases). In response to respondents' petition for rehearing, however, the Ninth Circuit abruptly reversed course, and aligned itself with the Second Circuit, which had meanwhile come out the other way on the issue (without addressing any of the contrary precedents). *See* App. 41-42a (citing *WorldCom*, 496 F.3d at 256).

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erred By Holding That The Federal Common Law Government-Contractor Defense Does Not Apply As A Matter Of Law To Claims Under The Price-Anderson Act.

The Ninth Circuit erred, as a threshold matter, by holding that the federal common law government-contractor defense does not apply as a matter of law to claims under the PAA. For all intents and purposes, the court thereby abolished the United States' sovereign immunity where, as here, the Government relies on private parties to implement its discretionary decisions involving nuclear emissions.

There is no question that sovereign immunity generally bars claims directly against the United States challenging discretionary decisions, whether in the nuclear context or any other context. *See, e.g.*, 28 U.S.C. § 2680(a); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 992-99 (9th Cir. 1987);

Allen v. United States, 816 F.2d 1417, 1419-24 (10th Cir. 1987). The federal common law government-contractor defense protects that immunity by preventing parties who cannot sue the United States *directly* for its discretionary decisions from suing the United States *indirectly* by suing private contractors tasked with implementing such decisions. *See, e.g.*, *Boyle*, 487 U.S. at 512; *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940).

The government-contractor defense, thus, does not exist to protect government contractors; it exists to protect the sovereign immunity of the United States. "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Boyle*, 487 U.S. at 512. Regardless of whether the United States is legally obligated to indemnify the contractor, the United States ultimately pays the price. *See, e.g., Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1452 (9th Cir. 1990) ("[P]ermitting the contractor to be held liable would undercut the effectiveness of the [government's] immunity ..., since contractors would eventually pass off the costs of such litigation to the government in [their] contract price."); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983) ("[H]olding the supplier liable in government contractor cases ... would subvert [sovereign immunity] since military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States."); *id.* at 450-51 ("It is consistent with [sovereign immunity] to construe the government contractor rule so as to avoid

imposing on the contractor liability properly attributable to acts of [the] government."). Where (as here) the United States is required to indemnify the contractor, contractor liability is passed along even *more* directly, so the government-contractor defense applies with even *greater* force.

Moreover, the government-contractor defense "is based not on a simple economic concern for government procurement costs, but on the government's need to exercise judgment." *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997); *see also McKay*, 704 F.2d at 449 ("[T]o hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions."). The defense, in other words, protects more than just the public fisc; it also protects the Government's discretionary decisionmaking. *See Snell*, 107 F.3d at 746 ("The defense is intended to implement and protect the discretionary function exception under the Federal Tort Claims Act, 28 U.S.C. § 2680(a)."); *see also Nielsen*, 892 F.2d at 1454 ("The [*Boyle*] Court reasoned persuasively that the interests of the government in avoiding scrutiny of sensitive military decisions" justifies the government-contractor defense); *id.* (noting that *Boyle* "changed the intellectual mooring of [the government contractor] defense ... to the discretionary function exception of the Federal Tort Claims Act"). Indeed, the Ninth Circuit acknowledged below that "[t]he defense is intended to implement and protect the discretionary function exception of the Federal Tort Claims Act." App. 19a. Whether the United States' discretionary military decisions are implemented by the United

States itself or by a private party, those decisions should not be subject to second-guessing in the courts through lawsuits for damages.

It is important to emphasize that the Ninth Circuit did not hold that the government-contractor defense does not apply on the specific facts of this case. Rather, the decision below is far more sweeping: the Ninth Circuit held that the defense is categorically inapplicable to *any* claim arising under the Price-Anderson Act, even if it is undisputed that the defense would otherwise apply. *See* App. 18-26a. That is so, according to the Ninth Circuit, because that defense "was *first* recognized by the Supreme Court less than twenty years ago in *Boyle*." App. 19a (emphasis added). Thus, the Ninth Circuit held that "[d]efendants are not entitled to the government contractor defense, because *the statute predates clear judicial recognition of any such defense*." App. 21a (emphasis added); *see also id.* at 9a ("Congress enacted the PAA before the courts recognized the government contractor defense.").

That holding is not only far-reaching but clearly wrong. This Court did not make up the government-contractor defense out of whole cloth in *Boyle*; rather, that defense has been well established at least since the Court's *Yearsley* decision in 1940. *See* 309 U.S. at 20-21 ("[I]f th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."). *Boyle* simply reaffirmed the defense in 1988, and made clear that it applies not only to performance contracts (like the ones at issue in *Yearsley* and here) but also to procurement contracts.

See, e.g., *Boyle*, 487 U.S. at 506 (noting that *Yearsley* recognized the federal common law government-contractor defense for performance contracts, and "we see no basis for a distinction" between performance contracts and procurement contracts"). Not surprisingly, many courts before *Boyle*—*including the Ninth Circuit itself*—relied on *Yearsley* to apply the federal common law government-contractor defense to contractors who implemented the Government's discretionary decisions. *See, e.g.*, *McKay*, 704 F.2d at 448 (noting that the government-contractor defense, "first articulated by the Supreme Court in *Yearsley* ..., protects a government contractor from liability for acts done by him while complying with government specifications during execution of performance of a contract with the United States"); *Koutsoubos v. Boeing Vertol, Div. of Boeing Co.*, 755 F.2d 352, 354 (3d Cir. 1985) ("It is clear that federal common law provides a defense to liabilities incurred in the performance of government contracts.") (citing *Yearsley*); *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) ("Traditionally, the government contractor defense shielded a contractor from liability when acting under the direction and authority of the United States.") (citing *Yearsley*). The Ninth Circuit below thus based its narrow interpretation of *Yearsley* on the *dissent* in *Boyle*. *See* App. 22a (quoting *Boyle*, 487 U.S. at 524-25 (Brennan, J., dissenting)).

Indeed, the Ninth Circuit's analysis fails on its own terms, because *Boyle* was decided *before* the relevant amendments to the PAA in 1988 established an exclusive federal cause of action for all injuries allegedly caused by nuclear emissions. *See* App. 21a. The Ninth Circuit tried to downplay that point by

asserting that "[w]hile the government contractor defense was technically a recognized common law principle at the time Congress enacted the PAA, it was hardly a well-established doctrine." *Id.* But, as noted above, the government-contractor defense *was* "a well-established doctrine," at least as applied to performance contracts, decades before *Boyle*. And how the Ninth Circuit could declare that the doctrine was not "well established" even *after* it was specifically endorsed by this Court in a high-profile case is a mystery. If anything, the fact that this Court decided *Boyle* just two months before the relevant PAA amendments only *strengthens* the presumption that *Boyle* set a clear legal baseline against which those amendments were enacted.

The key point here is that if Congress wanted to negate the federal common law government-contractor defense in cases under the PAA, it could and would have said so in the statute. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.") (internal quotation omitted). Thus, a federal statute will not be deemed to abrogate a federal common law rule unless the statute "speak[s] directly" to the question addressed by the common law. *Id.* (internal quotation omitted); *see also County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 236-37 (1985).

Indeed, Congress *did* negate the government-contractor defense in specific provisions of the PAA not applicable here, thereby underscoring that it was

perfectly well aware of the defense. For example, in the limited context of underground nuclear detonations, the PAA provides that "no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar ... liability." 42 U.S.C. § 2210(d)(7). The Ninth Circuit, however, dismissed this provision as "not clear." App. 24a. According to the Ninth Circuit, "[i]t ... appears to be referring to traditional sovereign immunity from any liability rather than the more sophisticated principles of accountability that underlie modern exceptions of governmental tort liability." *Id.* But this provision by its terms applies to government "contractor[s]," which are not entitled to "traditional sovereign immunity." *See, e.g., Boyle*, 487 U.S. at 505 n.1; *United States v. Orleans*, 425 U.S. 807, 813-14 (1976). The point here is that Congress was perfectly capable of limiting generally applicable defenses like the government-contractor defense in the PAA when it wanted to. *See, e.g.*, 42 U.S.C. § 2210(n)(1) (authorizing the Secretary of Energy to obtain a waiver of "any issue or defense as to charitable or governmental immunity" with respect to "any extraordinary nuclear occurrence"); 42 U.S.C. § 2210(d)(1)(B)(i)(II) (authorizing the Secretary of Energy to "incorporate in agreements of indemnification ... the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity"). These provisions would be inexplicable if such defenses were categorically unavailable under the PAA in the first place.

The Ninth Circuit thus ultimately retreated to asserting that "[e]ven assuming ... that Congress

intended to ensure that the modern defense did not apply to underground detonation claims, it does not follow that Congress also intended, without saying so, that the defense would apply in all other situations." App. 24a. But that assertion negates the Ninth Circuit's basic premise that the 1988 PAA amendments were not enacted against the background of the federal common law government-contractor defense. In light of that premise, statutory silence with respect to the government-contractor defense cannot be construed as an implicit abrogation of that defense. *See, e.g.*, *Texas*, 507 U.S. at 534.

The Ninth Circuit, however, proceeded to assert that the government-contractor defense "would conflict with the Congressional statutory aim to provide compensation for nuclear injuries." App. 24a. But that assertion is question-begging. While "provid[ing] compensation for nuclear injuries" is certainly *a* goal of the PAA, it is neither the *only* goal nor an *absolute* goal. Because the United States has never waived its sovereign immunity for injuries involving nuclear emissions allegedly caused by its discretionary decisions, there can be no "Congressional statutory aim to provide compensation" for such injuries. If that compensatory goal were absolute, as the Ninth Circuit suggested, then Congress would have waived the United States' sovereign immunity.

Finally, the Ninth Circuit suggested the government-contractor defense was somehow inconsistent with the "comprehensive" PAA scheme, including its indemnification provisions. App. 25-26a; *see also id.* at 9a, 21a. That suggestion is

misplaced. Although the PAA is "comprehensive" in the sense that it provides the *exclusive* cause of action for all injuries allegedly caused by nuclear emissions, *see, e.g.*, *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991), it is not "comprehensive" in the sense that it sets forth a reticulated scheme of substantive liability and defenses. To the contrary, the Act generally incorporates substantive *state* law, and does not purport to set forth the underlying standards for liability or defenses. *See* 42 U.S.C. § 2014(hh). Therefore, the fact that the Act does not specifically *ratify* a particular defense does not mean that the Act thereby *abrogates* that defense.

Nor is there any merit to the suggestion that the Act's indemnification provisions implicitly negate the government-contractor defense. Those provisions simply ensure that entities covered by the Act will not face ruinous liability, and therefore decline to become involved in nuclear-related activities in the first place. It is worth noting in this regard that the Act is not limited to government contractors; to the contrary, the vast majority of nuclear facilities in this country are operated not by government contractors, but by private utilities. And even government contractors are not invariably covered by the defense; to the contrary, the defense applies only under limited circumstances where the contractor is implementing the Government's discretionary decisions. *See Boyle*, 487 U.S. at 512. The Act's indemnification provisions simply encourage utilities to invest in nuclear energy, provided that they meet certain safeguards (such as obtaining approved levels of insurance). *See* 42 U.S.C. § 2210(a), (b), (c). In no way does the Government's statutory

obligation to indemnify qualified operators of nuclear facilities *if* they are held liable under the Act suggest an intention to expand the circumstances under which they may be held liable. Indemnification is like a form of insurance, and certainly the fact that persons are insured provides no basis to expand their underlying liability. Indeed, indemnification provisions kick in only *after* an operator has been held liable, and hence have no bearing on whether the operator should be held liable in the first place.

Given that the Federal Government frequently relies on private contractors to implement its discretionary decisions, it is hard to overstate the practical implications of the decision below. Indeed, the Ninth Circuit's reasoning extends well beyond the PAA context. If it is true, as the Ninth Circuit held, that the federal common law government-contractor defense does not apply to the PAA because that defense was not well-established by the fall of 1988, then it logically follows that the defense does not apply to *any* federal statutory cause of action enacted before the fall of 1988. Because most federal statutory causes of action fall into this category, the Ninth Circuit effectively gutted the federal common law government-contractor defense, and thereby subjected the Government to potentially vast financial exposure for its discretionary decisions.

Whether the Ninth Circuit likes it or not, the government-contractor defense is the law of the land, just as it was the law of the land when Congress enacted the relevant PAA amendments in 1988. Petitioners should thus have the chance to try to establish that the defense applies to the facts of this case, which they were never allowed to do in light of

the district court's ruling, affirmed by the Ninth Circuit, that the defense does not apply to PAA claims as a matter of law. This Court should not allow the Ninth Circuit to have the last word on this important and far-reaching question of federal law, with dramatic implications for the United States' sovereign immunity, and thus should grant review.

II. The Ninth Circuit Erred By Holding That Petitioners May Be Held Strictly Liable Under The Price-Anderson Act For Federally Authorized Nuclear Emissions.

The Ninth Circuit further erred by affirming the district court's decision holding petitioners *strictly* liable for any injuries caused by I-131 emissions from Hanford, and thereby precluding petitioners from defending themselves without reference to the reasonableness of their conduct, including the fact that the challenged emissions were federally authorized. As several courts of appeals have recognized, the PAA does not allow the imposition of strict liability under state law (as incorporated into the PAA) for federally authorized emissions. *See, e.g., Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307-08 (11th Cir. 1998) (*per curiam*); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41 (1984) ("[S]tates are precluded from regulating the safety aspects of nuclear energy."); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208 (1983) ("[T]he safety of nuclear technology [is] the *exclusive* business of the federal government.") (emphasis added).

The Ninth Circuit did not purport to disagree with these decisions, but instead drew a distinction between federal safety standards promulgated under the APA and the military safety standards applied at Hanford during World War II and the early years of the Cold War. App. 27-28a. Although the Ninth Circuit recognized that the standards applied at Hanford were "established under the aegis of the United States Army," App. 28a, the court nonetheless declared that those standards "did not carry the force of law," and thus could not be characterized as "federally-authorized emission levels." *Id.*; *see also id.* (distinguishing between "site specific safety rules" established by the Army at Hanford and "comprehensive, federal standards"). That asserted distinction has no basis in law or logic.

Federal preemption did not spring into life upon the enactment of the APA in 1946. To the contrary, it has long been established that a valid exercise of federal power trumps any inconsistent exercise of state power. As this Court recognized in *Yearsley*, "if th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing [the Federal Government's] will." 309 U.S. at 20-21. Thus, if the Federal Government authorizes particular conduct, state law cannot impose liability (much less strict liability) for that conduct. *See, e.g.*, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 331-32 (1981) (state cannot impose liability for abandonment of railroad line authorized by ICC); *Radio Station WOW v. Johnson*, 326 U.S. 120, 132 (1945) (state cannot order transfer of broadcast license granted by FCC). Whether the

federal standard is site-specific or broadly applicable is immaterial: petitioners were entitled to rely on the federally approved dose limits, and are now entitled to defend themselves on the ground that they complied with those limits. The Ninth Circuit decision below opens the door to mischief, and undermines exclusive federal control over nuclear safety, by allowing state law to impose more stringent standards of care in this area than federal standards.

At the very least, the decision below on this score cannot possibly stand in light of the procedural posture of this case. The district court granted summary judgment against petitioners by holding that federal safety standards *never* preempt state law incorporated into the PAA. *See* App. 110-16a; 133a. The Ninth Circuit disavowed that broad holding, *see* App. 26-27a, by declaring instead that the military safety standards in this case "did not carry the force of law," App. 28a. But the Ninth Circuit had no factual basis for that assertion, given that the parties here dispute the nature and scope of the Army's safety standards at Hanford. Thus, under no circumstances was the Ninth Circuit entitled to affirm the grant of summary judgment against petitioners based on the theory that the federal safety standards at Hanford during the period in question lacked preemptive force.

III. The Ninth Circuit Erred By Holding That A Putative Class Member Who Files An Individual Lawsuit While A Motion For Class Certification Is Pending Is Nonetheless Entitled To Class Action Tolling.

Finally, the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling under *American Pipe*. *See* App. 38-42a. Indeed, in response to respondents' petition for rehearing, the Ninth Circuit flipped from one side of the circuit split to the other. *See* App. 61-66a. Unfortunately, the Ninth Circuit ended up on the wrong side of the split—and, regardless of which side is right or wrong, this Court should resolve this conflict on an important and recurring question of federal law.

The Ninth Circuit originally sided with the Sixth Circuit in holding that a plaintiff who files an individual action while a motion for class certification is pending cannot claim the benefit of *American Pipe* tolling. *See* App. 39-40a (citing *Wyser-Pratte*, 413 F.3d at 569); *see also Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983) (same); *cf. Wachovia Bank & Trust Co. v. National Student Mktg. Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) (same). On rehearing, respondents pointed out that the Second Circuit had subsequently come out the other way, in a decision that addressed neither the Ninth Circuit's original decision in this case nor any other contrary decision. The Ninth Circuit

nonetheless decided to follow the Second Circuit. *See* App. 41-42a (citing *WorldCom*, 496 F.3d at 256).

The Ninth Circuit thereby erred. As that court explained in its original decision below, "the purposes of class action tolling under *American Pipe* 'are not furthered when plaintiffs file independent actions before decision on the issue of class certification.'" App. 39a (quoting *Wyser-Pratte*, 413 F.3d at 569); *see also Glater*, 712 F.2d at 739; *Wachovia*, 650 F.2d at 346 n.7. The whole point of *American Pipe* tolling, after all, is to promote "the efficiency and economy of litigation which is a principal purpose" of the class action device by allowing plaintiffs to rely on a pending class action rather than filing their own separate lawsuits. 414 U.S. at 553; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983) ("Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid ... a needless multiplicity of actions.").

Needless to say, "[t]he policies behind Rule 23 [of the Federal Rules of Civil Procedure] and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing." *Glater*, 712 F.2d at 739; *see also Wyser-Pratte*, 413 F.3d at 568-69 ("The purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided."). A putative class member who files an individual lawsuit while class certification is pending obviously cannot claim to have relied on the pendency of the class action,

and allowing such a plaintiff to invoke *American Pipe* tolling would create the very inefficiency that *American Pipe* sought to prevent. "Plaintiffs should not be permitted to benefit from tolling while at the same time pursuing their own action." *In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132, 1150 (C.D. Cal. 2003).[3]

---

[3] Not surprisingly, as the Ninth Circuit noted in its original decision, "[c]ountless federal district courts" have come to this same conclusion. App. 39a (citing *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 451 (S.D.N.Y. 2003), *vacated*, 496 F.3d 245 (2d Cir. 2007); *Heritage*, 289 F. Supp. 2d at 1150); *see also Hubbard v. Correctional Med. Servs., Inc.*, No. 04-3412, 2008 WL 2945988, at *7-8 (D.N.J. July 30, 2008); *McMillian v. AMC Mortgage Servs., Inc.*, No. 07-773, __ F. Supp. 2d __, 2008 WL 2357236, at *2 & n.7 (S.D. Ala. June 10, 2008); *In re Fed. Nat'l Mortgage Ass'n Sec. Litig.*, 503 F. Supp. 2d 25, 33 n.7 (D.D.C. 2007); *Puttick v. America Online, Inc.*, Nos. MDL 1500, 05-Civ.-5748, 2007 WL 1522612, at *2-4 (S.D.N.Y. May 23, 2007); *In re Enron Corp. Sec. Litig.*, 465 F. Supp. 2d 687, 715-16 (S.D. Tex. 2006); *Irrer v. Milacron, Inc.*, No. 04-72898, 2006 WL 2669197, at *7 (E.D. Mich. Sept. 18, 2006); *Kozlowski v. Sheahan*, No. Civ.A. 05-C-5593, 2005 WL 3436394, at *3 & n.1 (N.D. Ill. Dec. 12, 2005); *Fezzani v. Bear, Stearns & Co.*, 384 F. Supp. 2d 618, 632-33 (S.D.N.Y. 2004); *Calvello v. Electronic Data Sys.*, No. 00-CV-800, 2004 WL 941809, at *3-4 (W.D.N.Y. Apr. 15, 2004); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 221 (E.D.N.Y. 2003); *Chazen v. Deloitte & Touche, LLP*, 247 F. Supp. 2d 1259, 1271-72 (N.D. Ala.), *aff'd in part & vacated in part on other grounds*, 88 Fed.Appx. 390 (11th Cir. 2003) (*per curiam*); *Shaffer v. Combined Ins. Co. of Am.*, No. 02-C-1774, 2003 WL 22715818, at *2-3 (N.D. Ill. Nov. 18, 2003); *Prohaska v. Sofamor, S.N.C.*, 138 F. Supp. 2d 422, 433 (W.D.N.Y. 2001); *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 514 (S.D.N.Y. 2001); *Chinn v. Giant Food, Inc.*, 100 F. Supp. 2d 331, 334-35 (D. Md. 2000); *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000); *Wahad v. City of New York*, No. 75

In reversing itself, the Ninth Circuit agreed with the Second Circuit that "applying *American Pipe* tolling to plaintiffs who filed individual suits before certification is consistent with the purpose underlying statutes of limitations," which the Second Circuit characterized as "provid[ing] notice to defendants of a claim before the underlying evidence becomes stale." App. 41-42a. But that argument proves too much: if that were true, then statutes of limitations should be tolled for any plaintiff who brings the same claim against a defendant that has already been brought by someone else, regardless of whether the first lawsuit was a class action. By filing an individual lawsuit while a motion for class certification is pending, a putative class member

---

Civ. 6203, 1999 WL 608772, at *5-6 (S.D.N.Y. Aug. 12, 1999); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C-897, 1998 WL 474146, at *8 (N.D. Ill. Aug. 6, 1998); *Stutz v. Minnesota Mining & Mfg. Co.*, 947 F. Supp. 399, 404 (S.D. Ind. 1996); *Chemco, Inc. v. Stone, McGuire & Benjamin*, No. 91-C-5041, 1992 WL 188417, at *2 (N.D. Ill. July 29, 1992); *Pulley v. Burlington N., Inc.*, 568 F. Supp. 1177, 1179-80 (D. Minn. 1983); *Wachovia Bank & Trust Co., N.A. v. National Student Mktg. Corp.*, 461 F. Supp. 999, 1011-12 (D.D.C. 1978), *aff'd in relevant part*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980). To be sure, a minority of district courts have come out the other way, thus mirroring at the district-court level the conflict that now exists at the appellate level. *See, e.g., In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 2692674, at *2, 4 (E.D. La. July 2, 2008); *Shriners Hosps. for Children v. Qwest Commc'ns Int'l, Inc.*, No. 04-cv-781, 2007 WL 2801494, at *2-3 (D. Colo. Sept. 24, 2007); *Lehman v. UPS, Inc.*, 443 F. Supp. 2d 1146, 1148-51 (W.D. Mo. 2006); *Schimmer v. State Farm Mut. Auto. Ins. Co.*, No. 05-cv-2513, 2006 WL 2361810, at *5-6 (D. Colo. Aug. 15, 2006); *Rochford v. Joyce*, 755 F. Supp. 1423, 1428 (N.D. Ill. 1990).

effectively opts out of the class, and thereby disclaims whatever benefits (like tolling) accrue to absent class members. *See, e.g., Fezzani v. Bear, Stearns & Co.*, 384 F. Supp. 2d 618, 632-33 (S.D.N.Y. 2004); *Heritage*, 289 F. Supp. 2d at 1149-50; *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000).

Nor is it true, as the Ninth Circuit declared in aligning itself with the Second Circuit, that denying *American Pipe* tolling to plaintiffs who file their own lawsuits while class certification is pending would "diminish" those plaintiffs' "right to file at the time of their choosing." App. 42a. While putative class members are free to file individual lawsuits while class certification is pending, they are not free to file *untimely* individual lawsuits. Once they miss the deadline, in other words, they no longer have a "right to file at the time of their choosing." *Id.* Indeed, the whole point of statutes of limitations is to negate any such "right." Respondent Wise is a good example: although she was diagnosed with thyroid cancer in April 1993, she did not file this lawsuit until July 1997, outside the relevant three-year statute of limitations for personal injuries, *see* Wash. Rev. Code § 4.16.080(2). At that point, her only basis for pursuing a claim was as a member of a timely filed class action. *See, e.g., American Pipe*, 414 U.S. at 552-56.

Regardless of whether the First and Sixth Circuits, on the one hand, or the Second and Ninth Circuits, on the other, are correct on this point, this Court should resolve the conflict. Plaintiffs who wish to bring an individual lawsuit while a motion for class certification is pending should know if they are

entitled to *American Pipe* tolling if their claims are untimely, because otherwise they presumably would not pursue such lawsuits. Similarly, defendants should know if such lawsuits are untimely, so that they can avoid the expense of litigating (or settling) them. And the lower courts should know how to resolve this recurring issue. *See, e.g., In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 2692674, at *2, 4 (E.D. La. July 2, 2008) (recognizing circuit split on this issue); *Shriners Hosps. for Children v. Qwest Commc'ns Int'l, Inc.*, No. 04-cv-781, 2007 WL 2801494, at *2-3 (D. Colo. Sept. 24, 2007) (same). In the end, no one benefits from continued uncertainty.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

KEVIN VAN WART, P.C.
TIMOTHY A. DUFFY
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

August 15, 2008

CHRISTOPHER LANDAU, P.C.
Counsel of Record
JEFFREY B. WALL
KIRKLAND & ELLIS LLP
655 Fifteenth St., NW
Washington, DC 20005
(202) 879-5000

APPENDIX

APPENDIX CONTENTS

Ninth Circuit Opinion,
August 14, 2007,
as amended by orders of April 4 & July 29, 2008
(deletions marked by ~~strikeout~~;
additions marked by shading) 1a

Ninth Circuit Order Amending Opinion and
Denying Petition for Rehearing *En Banc*,
April 4, 2008 ..... 61a

Ninth Circuit Order Amending Opinion,
July 29, 2008 ..... 67a

District Court Order Granting Plaintiffs' Motion to
Strike Government Contractor Defense,
March 30, 2004 ..... 68a

District Court Order Granting Plaintiffs' Motion
for Summary Judgment on Strict Liability,
November 3, 2004 ..... 87a

District Court Order Denying Defendants' Motion
for Reconsideration on Strict Liability,
March 15, 2005 ..... 119a

District Court Order Denying Defendants' Motion
for Summary Judgment on Statute of
Limitations,
July 22, 2004 ..... 135a

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: HANFORD NUCLEAR RESERVATION LITIGATION,
BARBARA JEAN PHILLIPS,

Plaintiff,

and

WANDA BUCKNER; SHIRLEY CARLISLE,

Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS & CO., a Delaware corporation; GENERAL ELECTRIC CO., a New York corporation; UNC NUCLEAR INDUSTRIES, INC., a Delaware corporation,

Defendants-Appellees.

No. 05-35648
D.C. No. CV-91-03015-WFN

In re: HANFORD NUCLEAR RESERVATION LITIGATION,

BARBARA JEAN PHILLIPS,

Plaintiff,

and

GLORIA HOPE; CLARA REISS; GLENDA WINSLOW; KATHRYN J. GOLDBLOOM, aka Kathryn Janelle Goldbloom,

Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS & CO., a Delaware corporation; GENERAL ELECTRIC CO., a New York corporation; UNC NUCLEAR INDUSTRIES, INC., a Delaware corporation,

Defendants-Appellees.

No. 05-35651
D.C. No. CV-91-03015-WFN

In re: HANFORD NUCLEAR RESERVATION LITIGATION,
BARBARA JEAN PHILLIPS,

Plaintiff,

and

GLORIA HOPE; CLARA REISS; GLENDA WINSLOW; WANDA BUCKNER; KATHRYN J. VANCAMPEN, aka Kathryn Janelle Goldbloom; SHIRLEY CARLISLE,

Plaintiffs-Appellees,

v.

E.I. DUPONT DE NEMOURS & CO., a Delaware corporation; GENERAL ELECTRIC CO., a New York corporation,

Defendants-Appellants,

and

UNC NUCLEAR INDUSTRIES, INC., a Delaware corporation,

Defendant.

No. 05-35678
D.C. No. CV-91-03015-WFN

BARBARA JEAN PHILLIPS,

Plaintiff,

and

STEVEN STANTON; GLORIA WISE,

Plaintiffs-Appellees,

v.

E.I. DUPONT DE NEMOURS & CO.; GENERAL ELECTRIC CO.,

Defendants-Appellants.

No. 05-35866
D.C. No. CV-91-03015-WFN

PAMELA DURFEY; PAULENE ECHO HAWK; DOROTHY GEORGE, on their own behalf and on behalf of a class of similarly situated persons,

Plaintiffs-Appellants,

v.

E. I. DUPONT DE NEMOURS & CO., a Delaware Corporation; GENERAL ELECTRIC CO., a New York Corporation, UNC NUCLEAR
No. 05-35892 INDUSTRIES, INC., a Delaware Corporation, ATLANTIC RICHFIELD COMPANY, ATLANTIC RICHFIELD HANFORD CO., a Washington Corporation; ROCKWELL INTERNATIONAL CORP., a Delaware Corporation; WESTINGHOUSE HANFORD CORP., a Delaware Corporation; WESTINGHOUSE ELECTRIC CORP., a Pennsylvania Corporation,

Defendants-Appellees.

No. 05-35892
D.C. No. CV-93-03087-WFN

In re: HANFORD NUCLEAR RESERVATION LITIGATION,
PAMELA DURFEY; PAULINE ECHO HAWK; DOROTHY GEORGE, on their own behalf and on behalf of a class of similarly situated persons,

Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS & CO., a Delaware corporation; GENERAL
No. 05-35895 ELECTRIC CO., a New York corporation; UNC NUCLEAR INDUSTRIES, INC., a Delaware corporation; ATLANTIC RICHFIELD COMPANY; ATLANTIC RICHFIELD HANFORD CO., a Washington corporation; ROCKWELL INTERNATIONAL CORP., a Delaware corporation; WESTINGHOUSE HANFORD CORPORATION, a Delaware corporation; WESTINGHOUSE ELECTRIC CORP., a Pennsylvania corporation,

Defendants-Appellees.

No. 05-35895
D.C. No. CV-91-03015-WFN

In re: HANFORD NUCLEAR
RESERVATION LITIGATION,
SHANNON C. RHODES,

Plaintiff-Appellant,

E.I. DUPONT DE NEMOURS & CO.,
a Delaware corporation;
GENERAL ELECTRIC CO.,
a New York corporation,

Defendants-Appellees.

No. 06-35165
D.C. No. CV-91-03015-WFN

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Senior Judge, Presiding

Argued and Submitted
February 7, 2007—Pasadena, California

Filed August 14, 2007

Before: Mary M. Schroeder, Chief Circuit Judge,
Alfred T. Goodwin and Michael Daly Hawkins,
Circuit Judges.

Opinion by Chief Circuit Judge Schroeder

COUNSEL

Peter Nordberg, Berger & Montague, P.C., Philadelphia, Pennsylvania; Roy S. Haber, Roy S. Haber, P.C., Eugene, Oregon; Daniel Johnson and David Breskin, Short Cressman & Burgess, PLLC, Seattle, Washington, for the plaintiffs-appellants-appellees.

Christopher Landau, Kirkland & Ellis, LLP, Washington, D.C., for the defendants-appellees-appellants.

OPINION

SCHROEDER, Chief Circuit Judge:

I. Introduction.

The origins of this case trace back more than sixty years to the height of World War II when the federal government solicited Appellants E.I. DuPont de Nemours & Co., General Electric, Inc., UNC Nuclear Industries, Inc., Atlantic Richfield Co., and Rockwell International Corp., (collectively "Defendants") to operate the Hanford Nuclear Weapons Reservation ("Hanford") in southeastern Washington. The Hanford Reservation was a plutonium-production facility that helped make the atomic bomb that dropped on Nagasaki, Japan in World War II.

A regrettable Hanford byproduct was the radioiodine emitted into the surrounding area. The plaintiffs in this litigation are over two thousand residents who now claim that these emissions, known as I-131, caused various cancers and other life-threatening diseases. The first group of plaintiffs filed a complaint in 1990 under the federal statute governing nuclear accidents, the Price-

Anderson Act ("PAA"), claiming they were entitled to damages for injuries arising from a nuclear incident pursuant to 42 U.S.C. §2210. The history is discussed in our earlier opinions in *In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124 (9th Cir. 2002) ("*In re Hanford*"); and *Berg v. E.I. DuPont de Nemours & Co.*, 293 F.3d 1127 (9th Cir. 2002) ("*Berg*"). After almost two decades of litigation, which already has included two appeals to this court, the parties in 2005 agreed to a bellwether trial. The trial was designed to produce a verdict that would highlight the strengths and weaknesses of the parties' respective cases and thus focused on six plaintiffs ("Plaintiffs") who were representative of the larger group. The purpose of the trial was to promote settlement and bring long-overdue resolution to this litigation.

Before us on appeal is a litany of issues stemming from the bellwether trial. A threshhold issue is whether Defendants may seek complete immunity under the common law government contractor defense, because they were operating Hanford at the request of the federal government. We hold that the defense is inapplicable as a matter of law, because Congress enacted the PAA before the courts recognized the government contractor defense, and the PAA provides a comprehensive liability scheme that precludes Defendants' reliance on such a defense.

In the alternative, Defendants argue that even if they are not immune, they are not strictly liable for any I-131 emissions, because the amounts of the emissions were within federally-authorized levels; the plutonium-production process was not an

abnormally dangerous activity that would create strict liability; and even if it were, Defendants qualify for the "public duty" exception to strict liability. The district court held that none of Defendants' contentions were sufficient to relieve them of strict liability for the injuries they caused. We agree.

With respect to the trial itself, the district court with admirable diligence ruled on many issues of first impression. We hold that under Washington law, the district court properly instructed the jury that to impose liability, it had to find Hanford was the "but for" cause of Plaintiffs' diseases and not just a contributing cause under the more lenient "substantial factor" test. The court also made a host of evidentiary rulings that are before us on appeal. We hold that three of these rulings constitute reversible error with respect to three of the Bellwether Plaintiffs.

There are statute of limitations issues as well. ~~We hold that any Hanford Plaintiffs who filed independent suits pending class certification lost the benefits of class action tolling, thus potentially rendering their suits untimely. Because the record before us is incomplete as to the date necessary to measure the appropriate tolling period for various plaintiffs, we remand the statute of limitations issues to the district court for further proceedings~~ We hold that any Hanford Plaintiffs who filed independent suits pending class certification are entitled to class action tolling.

Lastly, we hold that the district court properly dismissed any medical monitoring claims as not

cognizable under the PAA. This is consistent with our decision in *Berg*, 293 F.3d 1127.

II. Background.

The United States government constructed Hanford during World War II to manufacture plutonium for military purposes. The facility was a component of the Army Corps of Engineer's secret Manhattan Project, with the primary objective of developing an atomic bomb. In 1942, the Army Corps began hiring civilian contractors to help build and operate the Hanford facility. It first recruited the University of Chicago Metallurgical Laboratory ("Met Lab") to design the process and equipment to produce plutonium. It then solicited E.I. DuPont de Nemours & Co. ("DuPont") to actually run the facility. It is apparent the government itself did not have the expertise or resources to operate Hanford.

DuPont initially refused. The government, however, persisted and implored DuPont to run the plutonium-production facility, because, as the government provided in DuPont's contract, the project was of the "utmost importance" and was "necessary in facilitating the prosecution of the war." DuPont eventually acquiesced, stating it would run the facility out of patriotic considerations. It accepted only one dollar as payment for its services. Several years later, the Hanford facility successfully produced the plutonium that was used in 1945 to drop the atomic bomb on Nagasaki and effectively end World War II. (The bomb dropped on Hiroshima was uranium-based, not plutonium-based).

As part of the plutonium-production process, the Hanford facility emitted I-131, a fission byproduct known as radioiodine. I-131 was known at the time

to have potential adverse health effects on humans. Accordingly, the Met Lab scientists set tolerance doses for human exposure. For example, the Met Lab determined that the human thyroid should not absorb more than one rad per day for those individuals subject to continuous exposure in the area. A rad is a measurement of the amount of radioiodine absorbed into an organ or tissue. On the basis of these safe exposure limit estimates, the Met Lab approved a detailed operating procedure that would ensure that the plutonium was produced within those emission limits. The key to decreasing I-131 emissions was to allow for longer cooling times of the uranium slugs used to produce the plutonium. This strategy, however, often conflicted with the federal government's orders to increase plutonium production.

On September 1, 1946, DuPont transferred its duties to General Electric ("GE"), which also agreed to earn no profit from its work. GE ran the Hanford facility through the Cold War. During the period of its operation, GE asked the federal government to increase cooling times to allow for lower emissions of I-131. By this time, Congress had established the Atomic Energy Commission ("AEC"), *see* 42 U.S.C. §§ 2011-2013 (1946), and GE was bound by its determinations. The AEC denied the request for longer cooling times, and GE continued to produce plutonium consistent with government demands. By the 1950s, however, significant improvements were made to the production process, and I-131 emission levels dropped.

In 1987, the United States Department of Energy ("DOE") created the Hanford Environmental Dose

Reconstruction Project ("HEDR"), overseen by the Center for Disease Control and Prevention. The underlying purpose of the HEDR was to estimate and reconstruct all radionuclide emissions from Hanford from 1944 to 1972 in order to ascertain whether neighboring individuals and animals had been exposed to harmful doses of radiation. Of particular concern to the HEDR were the estimated doses of I-131 received by the thyroid glands of humans, principally through consumption of milk from cows that ingested contaminated vegetation on neighboring farms and pastures. The HEDR concluded that I-131 emissions peaked during the period from 1944 to 1946, when an estimated 88% of Hanford's total iodine emissions occurred. HEDR explained that in later years, emissions declined because of technological advances. In 1990, the Technical Steering Panel of HEDR released a report entitled Initial Hanford Radiation Dose Estimates that publicly disclosed for the first time that large quantities of radioactive and non-radioactive substances had been released from Hanford, beginning in the 1940s.

This disclosure sparked a blaze of litigation. Thousands of plaintiffs filed suit pursuant to the Price-Anderson Act, 42 U.S.C. § 2210(n)(2), which had been amended in 1988 to provide exclusive federal jurisdiction over all claims arising from a nuclear incident, otherwise known as public liability actions. The PAA allowed the plaintiffs to sue private parties, such as DuPont, and to consolidate the claims in federal district court. *Id.* While Congress wanted to ensure that victims of nuclear incidents recovered compensation, it also included government indemnification provisions in the PAA

to give private parties an incentive to participate in the nuclear industry. *See, e.g.*, S. REP. NO. 100-70, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1425-26.

The PAA provides that although federal courts have exclusive and original jurisdiction over claims stemming from nuclear incidents, the substantive rules of decision are provided by the law of the state in which the nuclear incident occurs. *See* 42 U.S.C. § 2014(hh). Plaintiffs therefore brought tort claims under Washington law, asserting that because Defendants were engaged in an abnormally dangerous activity, they were strictly liable for any Hanford-caused radiation illness.

On August 6, 1990, a group of plaintiffs filed a joint consolidated complaint in the Eastern District of Washington, alleging a class action against Defendants. In 1991, the district court consolidated any and all Hanford-related actions pending in various courts, directed preparation of one consolidated complaint, and designated specific lead counsel for all parties. In an order dated September 22, 1994, the district court addressed the issue of class certification and decided to reserve decision under Federal Rule of Civil Procedure 23(b)(3) pending further discovery on causation issues.

Accordingly, pending class certification, the litigation proceeded as a consolidated action. Throughout this period, the district court entertained a handful of dispositive motions, which led to two appeals to this court. In 2002, we heard *In re Hanford*, 292 F.3d 1124, challenging the district court's dismissal of plaintiffs who could not establish they received a "doubling dose" of

radiation. We held that Plaintiffs' claims should proceed even if they could not show that Hanford radiation doubled their risk of illness, and we remanded for trial. *Id.* at 1139.

We also heard the appeal in the related case, *Berg*, 293 F.3d 1127. The *Berg* plaintiffs had not yet suffered from any illness, but sued Defendants for medical monitoring. We held that medical monitoring claims were not compensable under the PAA and upheld the district court's dismissal of those actions with prejudice. *Id.* at 1133.

After our decisions in *In re Hanford* and *Berg*, Judge William Fremming Nielsen steered the case toward resolution. The parties agreed to proceed with a bellwether trial, hoping it would reveal the strengths and weaknesses of their respective cases and thus pave the way for a settlement. The parties eventually agreed on twelve bellwether plaintiffs. Six of these plaintiffs had their claims dismissed on dispositive, pre-trial motions. The remaining six plaintiffs went to trial in April 2005.

The Bellwether Plaintiffs represent plaintiffs who suffer from various thyroid diseases they claim were caused by radiation emanating from Hanford. Plaintiffs Gloria Wise and Steven Stanton have thyroid cancer. Plaintiffs Wanda Buckner, Shirley Carlisle, and Kathryn Goldbloom suffer from hypothyroidism, a condition that slows the body's metabolism. Hypothyroidism is most frequently caused by Hashimoto's disease, an illness that Plaintiffs claim was caused by Hanford radiation. Plaintiff Shannon Rhodes suffers from lung cancer, which her doctors concluded was a form of Hurthle

cell thyroid cancer that had metastasized from a thyroid lobe previously removed.

Prior to trial, the Bellwether Plaintiffs made several motions to strike Defendants' affirmative defenses. Defendants first claimed that the government contractor defense insulated them from all liability. The district court, in an unpublished 2003 order, struck the defense under Federal Rule of Civil Procedure 12(b), holding that the PAA displaced any such defense as a matter of law. In a published order, the court also ruled that plutonium production at Hanford was an abnormally dangerous activity warranting strict liability under Washington law. *In re Hanford Nuclear Res. Litig.*, 350 F. Supp. 2d 871, 888 (E.D. Wash. 2004). It then limited the issues at trial to causation and damages. *Id.*

The primary dispute at trial was whether the amount of radiation to which each plaintiff was exposed was sufficient to be the cause-in-fact of his or her thyroid disease. There was extensive testimony that I-131 radiation causes Hashimoto's disease, a cause of hypothyroidism, and that I-131 can also be a contributing factor to thyroid cancer. The testimony revealed, however, that to date epidemiological studies can establish only that radiation of at least 100 rads is a contributing factor to thyroid illness. Some epidemiological studies hypothesize that 40 rads might cause Hashimoto's disease, but there are no data beyond that threshold.

Because many Plaintiffs were not exposed to radiation above 40 rads, and no Plaintiff was exposed to radiation above 100 rads, Plaintiffs had to present expert testimony that scientific extrapolation permitted a finding of causation below

40 rads. Their primary experts were Dr. Terry Davies, an endocrinologist, Dr. Sara Peters, a pathologist, Dr. F. Owen Hoffman, a causation expert, and Dr. Colin Hill, a radiation cell biologist. Plaintiffs also proffered the expert testimony of epidemiologist Dr. A. James Ruttenber, but key parts of his testimony relating to causation were excluded.

After fourteen days of trial and four days of deliberations, the jury found in favor of two plaintiffs, Steve Stanton and Gloria Wise; the jury hung with respect to one plaintiff, Shannon Rhodes; and it found in favor of Defendants with respect to the remaining three plaintiffs, Wanda Buckner, Shirley Carlisle, and Kathryn Goldbloom. As damages for prevailing plaintiffs, the jury awarded Stanton $227,508 and Wise $317,251. Because the jury could not reach a verdict with respect to Plaintiff Rhodes, the district court declared a mistrial. Rhodes re-tried her claims in front of a second jury in November 2005, and the jury entered a defense verdict on all counts.

Rhodes, along with the three non-prevailing plaintiffs in the first trial, appeal a variety of evidentiary rulings, as well as the district court's jury instruction that under Washington law Plaintiffs had to prove "but-for" causation, rather than "substantial factor" causation. Defendants appeal the judgments entered in favor of the two prevailing plaintiffs, claiming the district court erred as a matter of law in striking the government contractor defense. In the alternative, Defendants argue that Plaintiffs may not proceed under a strict liability theory, because the I-131 emissions were

within federally-authorized levels. They also contend the plutonium-production process was not an abnormally dangerous activity under Washington law and, even if it were, that Defendants qualify for the narrow "public duty" exception to strict liability.

Defendants also contend that prevailing Plaintiff Wise's suit was untimely under Washington's statute of limitations. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Wise had filed an independent action in 1997, likely beyond the statutory period, but Defendants did not invoke *American Pipe* and the district court allowed Wise's claim to proceed as part of the pending class action.

Apart from the issues relating to the Bellwether Plaintiffs, Plaintiffs Pamela Durfey, Paulene Echo Hawk, and Dorothy George, who do not yet have symptoms of any thyroid disease, sued Defendants for the costs of medical monitoring. The district court, following this court's decision in *Berg*, 293 F.3d at 1132-33, held that the PAA precluded any medical monitoring claims that were unaccompanied by physical injury. Rather than remanding those claims to state court, however, the district court held that the PAA bestowed exclusive jurisdiction in the federal courts for claims arising from a nuclear incident, and that therefore the PAA's provisions preempted any state-derived medical monitoring claim. Accordingly, it directed entry of final judgment for DuPont under Federal Rule of Civil Procedure 54(b). The plaintiffs appeal this dismissal.

III. The Government Contractor Defense.

The overarching issue before us is Defendants' contention that the government contractor defense is

available to them as a matter of law and that it provides complete immunity from liability if its substantive requirements are satisfied. The district court held that the affirmative defense was inapplicable as a matter of law because the provisions of the PAA cannot be reconciled with the defense and implicitly displace it. We review *de novo* the district court's conclusion that the affirmative defense is unavailable, *United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006), and we reach the same conclusion.

The government contractor defense is by now an established component of federal common law, but it was first recognized by the Supreme Court less than twenty years ago in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). The defense is intended to implement and protect the discretionary function exception of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), which was enacted after World War II. The defense allows a contractor-defendant to receive the benefits of sovereign immunity when a contractor complies with the specifications of a federal government contract. *Boyle*, 487 U.S. at 511-12. As the Court said in *Boyle*, "[i]t makes little sense to insulate the Government against financial liability for the judgment that . . . equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512.

As a threshold matter, we agree with Defendants that the government contractor defense applies not only to claims challenging the physical design of a military product, but also to the process by which such equipment is produced. Accordingly, a

contractor who agrees to operate a production facility pursuant to government specifications may qualify for the defense.

The issue here, however, is whether the PAA preempts reliance on the common law doctrine, either because the defense contradicts the federal statute or because the statute predates the defense. Congress is presumed to "legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). A federal statute enacted after a common law doctrine has been established will not therefore abrogate the federal common law rule unless the statute speaks directly to the question addressed by common law. *United States v. Texas*, 507 U.S. 529, 534 (1993). This is because "where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria*, 501 U.S. at 108 (internal quotations and citations omitted) (holding that the court should assume Congress drafted the Age Discrimination in Employment Act with the common law administrative estoppel doctrine in mind); *see also Pasquantino v. United States*, 544 U.S. 349, 359 (2005).

Whether the PAA preempts the government contractor defense is therefore a two-step inquiry. We must first determine whether the government contractor defense was well-established at the time Congress enacted the operative version of the PAA. If so, we must determine whether a statutory

purpose contrary to the government contractor defense is evident.

The defense fails the first inquiry. Defendants are not entitled to the government contractor defense, because the statute predates clear judicial recognition of any such defense. In addition, the statute's comprehensive liability scheme is patently inconsistent with the defense and precludes its operation in this case.

The Supreme Court's decision in *Boyle* was filed on June 27, 1988. Less than two months later, the PAA was amended, on August 20, 1988, to include the pertinent language establishing exclusive federal jurisdiction for all public liability claims arising from nuclear incidents. While the government contractor defense was technically a recognized common law principle at the time Congress enacted the PAA, it was hardly a well-established doctrine. *See Astoria*, 501 U.S. at 108. (noting that courts should presume Congress legislated with an expectation that a common law doctrine would apply only if the common-law principle was well-established). ~~When drafting the bill, Congress could not have considered whether or not the government contractor defense would affect liability under the PAA, because the Supreme Court defined the defense only a few weeks before the PAA was signed into law.~~ Congress did not have the benefit of any well-established common law principles relating when Congress drafted the relevant provisions of the PAA. The Supreme Court defined the defense only a few weeks before the PAA was signed into law.

The origins of the defense in the cases antecedent to *Boyle* do not materially affect this analysis. In

1940, the Supreme Court arguably planted the seeds of the government contractor defense in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940). It held that an agent of the government could not be held liable under the Takings Clause for the defective construction of a dam that damaged land, as long as the agent followed government specifications for the dam's construction. The Court limited the applicability of the defense to principal-agent relationships where the agent had no discretion in the design process and completely followed government specifications. Nothing in *Yearsley* extended immunity to military contractors exercising a discretionary governmental function. *See Boyle*, 487 U.S. at 524-25 (J. Brennan, dissenting) (*Yearsley* is "a slender reed on which to base so drastic a departure from precedent" . . . . "[It] has never been read to immunize the discretionary acts of those who perform service contracts for the Government").

While some circuit courts began extending the *Yearsley* doctrine to military contractors as early as the 1960s, *see McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448-49 (9th Cir. 1983) (citing cases), other circuits held that *Yearsley* was clearly limited to principal-agent relationships and did not apply to military contractors, *see, e.g., Bynum v. FMC Corp.*, 770 F.2d 556, 564 (5th Cir. 1985). In light of the conflicting authority on the matter, it is clear that neither the scope nor the contours of the defense were well-defined until the Supreme Court's 1988 decision in *Boyle*. ~~We therefore conclude that the government contractor defense was not well established at the time Congress enacted the PAA~~

We therefore conclude that the government contractor defense was not judicially well-established at the time Congress enacted the PAA.

~~Because Congress did not enact the PAA against a backdrop of common law principles that included the government contractor defense, we cannot grant immunity from liability. *Astoria*, 501 U.S. at 108. The federal common law defense exists only in the absence of explicit statutory directive. *Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981); *Boyle*, 487 U.S. at 504. In this case, Congress drafted a precise, comprehensive litigation scheme for injuries sustained in a nuclear incident. The federal courts have recognized this congressional intent. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *In re TMI Litigation Cases*, 940 F.2d 832, 854-55 (3d Cir. 1991) ("*In re TMI Litig.*"). That scheme governs the conduct of this litigation.~~

Because Congress did not enact the PAA against a backdrop of well-established common law principles that included the government contractor defense, we cannot grant immunity from liability.

Defendants argue that even if the doctrine was not judicially well-established, Congress passed the 1988 amendments to the Act with the defense in mind and intended that it apply. The defendants point to a provision in the PAA relating to underground detonation. The provision is 42 U.S.C. § 2210(d)(7), which states as follows:

> A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall

Best Available Copy

> be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

Defendants contend the provision demonstrates that Congress intended to eliminate the modern government contractor defense for underground detonation and further contend that the provision demonstrates Congress intended the government contractors defense as we know it today to apply to all other claims arising out of nuclear incidents.

The language of § 2210(d)(7) is not clear. It refers to "immunity or defense" founded on the "character of the contractor or of the work." It thus appears to be referring to traditional sovereign immunity from any liability rather than the more sophisticated principles of accountability that underlie modern exceptions of governmental tort liability. *See* Federal Tort Claims Act, 28 U.S.C. § 2680(a); *Boyle*, 487 U.S. at 512.

Even assuming, however, that Congress intended to ensure that the modern defense did not apply to underground detonation claims, it does not follow that Congress also intended, without saying so, that the defense would apply in all other situations. Such a result would conflict with the Congressional statutory aim to provide compensation for nuclear injuries.

The defense is therefore inconsistent with Congressional purpose and the PAA preempts the defense for that reason as well. Congress drafted a precise, comprehensive litigation scheme for injuries sustained in a nuclear incident. The federal courts have recognized this Congressional intent. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *In re TMI Litigation Litig. Cases*, 940 F.2d 832, 854-55 (3d Cir. 1991) ("In re TMI Litig."). That scheme governs the conduct of this litigation. As the district court correctly concluded, "Congress has clearly spoken to the claims at issue in this case and its pronouncement, not a more general court-created common law defense[,] should govern the resolution of the claims." *In re Hanford Nuclear Reservation Litig.*, No. 91-3015, 2004 WL 5372483, slip op. at 11 (E.D. Wash. Mar. 25, 2004).

Congress enacted the PAA with twin goals in mind: to provide an incentive to contractors to participate in the nuclear industry by limiting their liability, and to compensate victims of nuclear accidents. *See, e.g.*, Pub. L. No. 100-408, 102 Stat. 1066 (1988); S. REP. NO. 100-218, at 4-13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1479-88. The Act placed Plaintiffs' state law claims in federal court and provided indemnification of Defendants from the federal government for any liability to victims of nuclear incidents. *See* 42 U.S.C. §2210; S. REP. NO. 100-218, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 1484, 1488. To allow those entitled to indemnity as government contractors to disclaim any liability because they are government contractors would be inconsistent with the goal of

the PAA to provide compensation to victims of nuclear incidents. We will not assume that in enacting the PAA's comprehensive scheme, Congress intended, yet failed to state in the Act, that victims of nuclear incidents cannot recover tort damages from nuclear operators when the operators were pursuing government goals. Accordingly, we hold that the government contractor defense is inapplicable as a matter of federal law and affirm the district court's ruling on this key issue.

IV. Strict Liability.

Defendants next argue that the district court erred as a matter of Washington state law in holding Defendants strictly liable for any I-131 emissions from the Hanford facility. Defendants challenge that ruling on three grounds: (1) that strict liability pursuant to Washington state law may not be imposed under the PAA if Defendants released I-131 within federally-authorized emission levels; (2) even if state liability law applies, the Hanford activity did not meet the "abnormally dangerous activity" test that warrants strict liability; and (3) even if Washington courts would apply a strict liability regime, Defendants would be exempted under the "public duty" exception that applies generally to heavily regulated entities doing potentially hazardous work. For the reasons below, we affirm the district court's imposition of strict liability.

A. Federally-Authorized Emissions.

It is not disputed that the federal government is in charge of nuclear safety. "[T]he safety of nuclear technology [is] the exclusive business of the Federal Government," which has "occupied the entire field of nuclear safety concerns." *Koller v. Pinnacle West*

Capital Corp., 2007 U.S. Dist. LEXIS 9186 (D. Ariz. Feb. 7, 2007) (second alteration in original) (quoting *Pac. Gas Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208, 212 (1983)). Every federal circuit that has considered the appropriate standard of care under the PAA has concluded that nuclear operators are not liable unless they breach federally-imposed dose limits. *See, e.g.*, *O'Conner*, 13 F.3d at 1105; *In re TMI Litig.*, 940 F.2d at 859; *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997).

Defendants are thus correct insofar as they point out that the clear weight of authority supports the principle that federal law preempts states from imposing a more stringent standard of care than federal safety standards. Strict liability may not be imposed for I-131 releases within federally-authorized limits, because any federal authorization would preempt state-derived standards of care. To allow a jury to decide on the basis of a state's reasonableness standard of care would "put juries in charge of deciding the permissible levels of radiation exposure and, more generally, the adequacy of safety procedures at nuclear plants—issues that have explicitly been reserved to the federal government." *In re TMI Gen. Publ. Utils. Corp.*, 67 F.3d 1103, 1115 (3d Cir. 1995) (citing *Pacific Gas*, 461 U.S. at 212). This result would undermine the purpose of a comprehensive and exclusive federal scheme for nuclear incident liability.

Defendants then go further, however, and argue that the district court in this case permitted the jury to substitute its view of a reasonable emission

standard for a government standard. The problem with Defendants' argument is that no federal standards governing emission levels existed at the time of the I-131 emissions. Defendants try to remedy this problem by pointing to "tolerance doses" recommended and implemented by military and government scientists working on the Hanford project and ask us to equate such recommendations with federally-authorized emission levels. They are not the same.

These tolerance doses, although established under the aegis of the United States Army, did not carry the force of law and thus cannot provide the basis for a safe harbor from liability. They amounted to no more than site-specific safety rules. The United States Army instructed the Manhattan Engineering District to set forth standard, internal operating procedures for the plutonium-production process at Hanford. The tolerance doses were part of these procedures. The Met Lab scientists calculated what they thought were the outer limits of safe exposure at the plant. These internal guidelines were, however, exactly and only what they claimed to be: internal. They were not comprehensive, federal standards governing emission levels on which Defendants could rely to relieve them from liability for harm they caused.

Defendants are correct that it would not have been possible for an agency to establish emission levels in the early 1940s, because the Atomic Energy Act was not enacted until 1954 and the Nuclear Regulatory Commission was created in 1974. In fact, the emissions occurred even prior to the enactment of the Administrative Procedure Act in

1946. This history, however, undermines Defendants' position, because it highlights the absence of any federal machinery to promulgate legal standards on which Defendants could have reasonably relied to insulate them from liability to those living and breathing twenty-four hours a day in the area surrounding Hanford. The need for such standards was not recognized until many years later.

B. Abnormally Dangerous Activity.

Defendants next argue that even if state law standards apply in this case, the district court erred by holding that Washington tort law would impose strict liability. Specifically, Defendants contend that operating the Hanford facility does not constitute an "abnormally dangerous activity" under Washington law. We review *de novo* the question of whether an activity is abnormally dangerous, *Langan v. Valicopters, Inc.*, 567 P.2d 218, 221 (Wash. 1977), and we affirm.

Washington has adopted the Restatement (Second) of Torts, sections 519 and 520, which outline the strict liability regime for abnormally dangerous activities. *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 920 (Wash. 1991); *New Meadows Holding Co. v. Wash. Water Power Co.*, 687 P.2d 212, 215 (Wash. 1984). Section 519 provides:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.

> (2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

Section 520 lists the factors to be used when determining what constitutes an abnormally dangerous activity:

> (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of another;
>
> (b) Whether the gravity of the harm which may result from it is likely to be great;
>
> (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
>
> (d) Whether the activity is not a matter of common usage;
>
> (e) Whether the activity is inappropriate to the place where it is carried on; and
>
> (f) The value of the activity to the community.

RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1977). A court does not have to weigh each of the elements listed in § 520 equally. *Langan*, 567 P.2d at 221. One factor, alone, however, is generally not sufficient to find an activity abnormally dangerous. *Id.*

Defendants argue that at the time of the emissions in the 1940s, they did not know the risks that were attributable to radioiodine exposure, and therefore § 520's factors (a)-(c) cannot be weighed against them. Any possible injury from radiation, however, need not have been actually known by Defendants at the time of exposure in order to impose strict liability. Under Washington law, if the

actual harm fell within a general field of danger which should have been anticipated, strict liability may be appropriate. Whether an injury should have been anticipated does not depend on whether the particular harm was actually expected to occur. *Koker v. Armstrong Cork, Inc.*, 804 P.2d 659, 667-68 (Wash. Ct. App. 1991). It is sufficient that "the risk created [be] so unusual, either because of its magnitude or because of the circumstances surrounding it. . . ." *Langan*, 567 P.2d at 221.

There is no question that Defendants should have anticipated some of the many risks associated with operating a nuclear facility, creating plutonium, and releasing I-131 into the atmosphere. It is exactly because of these risks, and the potential exposure to liability arising from them, that the government contracted with Defendants to limit liability in case of an accident. For these same reasons, the Met Lab scientists recommended dosage limits.

We agree with the district court that Defendants' conduct at Hanford was an abnormally dangerous activity under the § 520 factors. There was a high degree of risk to people and property associated with the Hanford facility and the gravity of any harm was likely to be great. *See* RESTATEMENT (SECOND) OF TORTS, § 520. Regardless of Defendants' efforts to exercise reasonable care, some I-131 would be released, and developing plutonium is hardly an activity of common usage. While the value to the community at large, i.e., the nation, of developing an atomic bomb was perceived as high and there is pragmatically no very appropriate place to carry on such an activity, the § 520 factors on balance support

holding that Defendants' activities were abnormally dangerous.

C. Public Duty Exception to Strict Liability.

Defendants' final defense is that even if their conduct constituted an abnormally dangerous activity, they are exempted from strict liability under Washington law pursuant to the "public duty" exception. *See* RESTATEMENT (SECOND) OF TORTS, § 521. While this issue presents a close question, we conclude that Defendants do not qualify for the exception.

Section 521 of the Restatement provides:

> The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

Id. As a threshold matter, Washington courts have not yet adopted § 521. We must therefore decide what the Washington Supreme Court would likely do if confronted with the issue. *See NLRB v. Calkins*, 187 F.3d 1080, 1089 (9th Cir. 1999). We hold that the court would likely adopt the public duty exception.

Although they have never explicitly adopted § 521, Washington courts have adopted § 519, which governs abnormally dangerous activities generally. The comments to § 519 indicate that the public duty exception is part and parcel of strict liability. Comment "a" to § 519 states that "[t]he general rule stated in this Section is subject to exceptions and qualifications, too numerous to be included within a single section. It should therefore be read together

with §§ 520 to 524A, by which it is limited." RESTATEMENT (SECOND) OF TORTS, § 519 cmt. a. Comment "d" further limits the scope of strict liability and states that persons are accountable only for abnormally dangerous activities they undertake "for [their] own purposes." *Id.* § 519 cmt. d. A key corollary to this point is that strict liability does not apply to activities carried on in pursuance of a public duty the actor was legally obligated to perform. *See id.* § 521.

Although Washington could adopt § 519 without adopting the numerous exceptions found in §§ 521-524A, it is unlikely that it would do so. Washington adopted wholesale the abnormally dangerous activity doctrine and its exceptions when they existed in the First Restatement. *See, e.g., Epperly v. Seattle*, 399 P.2d 591, 595 (Wash. 1965); *Foster v. Preston Mill Co.*, 268 P.2d 645, 647 (Wash. 1954). Furthermore, of the states that have adopted §§ 519-20, the vast majority has also adopted the subsequent exceptions.

Although widely adopted, the courts that have applied the public duty exception have generally done so only to the extent a defendant was legally required to perform the ultrahazardous activity. *See* RESTATEMENT (SECOND) OF TORTS, § 521, cmt. a. The Washington Supreme Court's decision in *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972), supports such an application of the public duty doctrine here. The defendants in *Siegler* were a trucking company for Texaco and its driver, and the company was not legally obligated as a common carrier to carry materials that eventually caused an explosive, fatal accident on a highway. The Washington court held

that the activity was abnormally dangerous and that the defendants could be held strictly liable for the accident. It is therefore most likely that the Washington Supreme Court would apply strict liability when the defendant was performing a dangerous activity for "his own purpose," and would apply the public duty exception only in the appropriate case when the defendant was engaged in a legally-obligated activity, such as a regulated common carrier bound to carry hazardous substances.

Defendants argue that in light of the exceptional and patriotic circumstances under which they operated Hanford, we should treat them as analogous to public employees who would qualify for the exception. Although Defendants are correct that we generally do not parse the language of a restatement as meticulously as that of a statute, and we will apply it "when the purposes it seeks to serve dictate its application," *McKay*, 704 F.2d at 447, Defendants do not satisfy the exception's purpose in this case. Defendants are not public officers or employees or common carriers, *see* RESTATEMENT (SECOND) OF TORTS, § 521, and they were not legally obligated to operate Hanford.

The prototypical example of a defendant entitled to the public duty exception is a utility company that is legally required to transport an ultrahazardous good, such as electricity, and causes injury to someone during transport. Courts have recognized a public duty exception in such cases, because common carriers must accept, carry, and deliver all goods offered to them for transport within the scope of the operating authority set forth in their permits. *See,*

e.g., 16 U.S.C. § 824 *et. seq.* (granting the Federal Energy Regulatory Commission authority to establish guidelines for common carriers of electricity in interstate commerce); *United States v. W. Processing Co.*, 756 F. Supp. 1416, 1421 (W.D. Wash. 1991). They cannot discriminate against customers or refuse to accept commodities that may be dangerous for transport. *Id.*

The case law therefore illustrates that the duty involved is the legal obligation to perform the abnormally dangerous activity in accordance with government orders. *See, e.g., EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715, 721 n.12 (1st Cir. 1984) (noting that the public duty must be one imposed on the actor) (citing *Actiesselskabet Ingrid v. Central R.R. Co. of New Jersey*, 216 F. 72 (2d Cir. 1914); *Town of East Troy v. Soo Line R.R. Co.*, 409 F. Supp. 326, 329 (E.D. Wis. 1976) (no strict liability for spillage of carbolic acid by derailment of common carrier train); *Christ Church Parish v. Cadet Chem. Corp.*, 199 A.2d 707, 708-09 (Conn. Super. Ct. 1964) (transportation of twenty tons of various chemical substances); *Pecan Shoppe of Springfield v. Tri-State Motor Transit Co.*, 573 S.W.2d 431, 438-39 (Mo. Ct. App. 1978) (transporter of explosives); *Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 595-96 (W. Va. 1953) (transporter of explosives). Qualifying entities must be operating pursuant to the mandate and control of the government; they must have little discretion over the manner in which they conduct their activities. *See Actiesselskabet Ingrid*, 216 F. at 78 ("It certainly would be an extraordinary doctrine for courts . . . to say that a common carrier is under legal obligation to transport

dynamite and is an insurer against any damage which may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury."); *Pope*, 75 S.E.2d at 591-92 (holding no strict liability for common carrier transport of explosives); *but see Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959 (W.D. Ky. 1993) (applying the public duty exception to a nuclear facility because under Kentucky law the public duty exception includes entities engaged in activities of public necessity even when there is no legal duty to perform them).

There was no government mandate here. The events giving rise to this litigation occurred before the government developed rules or the ability to control nuclear facilities. The government was relying on the expertise of defendants and not vice versa.

We should not confuse the legal concept of a public duty with popular notions of patriotic duty taken at personal sacrifice. Defendants may well have been acting at the government's urging during wartime. The public duty exception, however, was developed under state law in recognition of the need to protect private actors who are legally required to engage in ultrahazardous activities. No matter how strongly Defendants may have felt a patriotic duty, they had no legal duty to operate Hanford, and they are, therefore, not entitled to the public duty exception. The district court correctly found defendants subject to strict liability.

V. Statute of Limitations.

A. Waiver.

Defendants argue for the first time on appeal that Bellwether Plaintiff Gloria Wise's lawsuit was untimely, because pursuant to *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), Wise lost the benefit of any statute of limitations tolling when she filed a separate, individual suit prior to the denial of class certification. Defendants arguably have waived this claim, because they did not raise the issue below sufficiently for the district court to rule on the matter. *McMillan v. United States*, 112 F.3d 1040, 1047 (9th Cir. 1997); *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989). We have discretion, however, to overlook any waiver. *See United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003). We exercise such discretion in this case, because the issue of whether Wise's lawsuit was tolled pending class certification is a purely legal question, *see id.*; both parties concede that the issue is "important," and addressing the issue is consistent with the purpose of a bellwether trial in clarifying and streamlining the relevant issues. The issue should therefore be settled now.

We recognize that the results of the Hanford bellwether trial are not binding on the remaining plaintiffs. *See, e.g., In re Hanford Nuclear Res. Litig.*, No. 91-03015, Dkt. #1294 at 164-65 (E.D. Wash. June 3, 2003). Nevertheless, according to counsel for the parties, the purpose of the bellwether trial was to "establish the relative strengths and weaknesses of the parties, spread out mainly for settlement purposes. . . ." *Id.* at 155, 165. The bellwether trial was meant to be a "learning

process." *Id.* at 161. The parties also state in their briefs that there are "numerous" other plaintiffs who face a similar statute of limitations hurdle. It would defeat the purpose of a bellwether trial and only deter settlement longer to refrain from deciding this purely legal issue at the earliest possible stage. Our resolution will save any potentially time-barred plaintiffs from expending additional resources and energy on futile legal proceedings.

B. Application of American Pipe.

In April 1994, the Hanford plaintiffs moved for class certification. The district court reserved ruling on certification under the opt-out provision of Federal Rule of Civil Procedure 23(b)(3). Plaintiffs eventually withdrew their request for certification, but not until May 2003, after the first series of appeals was decided by this circuit. Accordingly, the district court held that the statute of limitations was tolled for all putative class members from April 1994 until May 2003.

Plaintiff Wise was diagnosed with thyroid cancer in April 1993, three years after the first class action complaints were filed and one year before Plaintiffs moved for class certification. Wise filed an individual suit in district court in July 1997. If the date of diagnosis is the triggering date for the statute of limitations, her individual suit was apparently untimely, because Washington's statute of limitations for personal injury claims is three years. Wise's suit would have been timely only if she was entitled to the tolling that began for the class action plaintiffs on April 15, 1994. Defendants now contend that Wise forfeited these tolling benefits when she filed her individual suit prior to the

district court granting or denying class certification. Wise contends she is entitled to tolling as a member of the class pursuant to *American Pipe*.

In *American Pipe*, 414 U.S. at 554, the Supreme Court held that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. *Id.* The tolling period ends, and the statute runs anew, once class certification is granted or denied. *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985). The issue in this case, which is one of first impression in our circuit, is whether *American Pipe* also permits tolling for a plaintiff who files a separate action pending class certification. ~~The overwhelming weight of authority answers the question in the negative.~~

~~The Sixth Circuit, which is the only circuit to have addressed the issue directly, has also said no. It held that the purposes of class action tolling under *American Pipe* "are not furthered when plaintiffs file independent actions before decision on the issue of class certification." *Wyser-Pratte Mgmt. Co., Inc. v. Telxon*, 413 F.3d 553, 569 (6th Cir. 2005). Such purposes are only furthered "when plaintiffs delay until the certification issue has been decided." *Id.* The Second [*sic*] Circuit tangentially reached a similar conclusion two decades earlier, when it stated that "[t]he policies behind Rule 23 and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing." *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983). Countless federal district courts have come to~~

the similar conclusion that "[a]pplying the tolling doctrine to separate actions filed prior to class certification would create the very inefficiency that *American Pipe* sought to prevent." *In re Worldcom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 451 (S.D.N.Y. 2003) (citing cases); *see also In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132, 1150 (C.D. Cal. 2003).

We share the prevailing view that precluding tolling in this situation satisfies the judicial economy concerns of *American Pipe* without jeopardizing protections that exist for plaintiffs who opt out of the class. We should not allow a plaintiff to file an individual suit, which is in essence a signal that the plaintiff is opting out of a class, and then simultaneously give the same plaintiff class action benefits. "The parties and courts [should] not be burdened by separate lawsuits which . . . may evaporate once a class has been certified." *Wyser-Pratte*, 413 F.3d at 569 (quoting *In re WorldCom*, 294 F. Supp. 2d at 452). Courts have recognized that class action tolling is intended to avoid the injustice of requiring putative class members to file individual suits or to lose their claims, but the benefits should not be abused. Tolling is not "intended to be a tool to manipulate limitations periods for parties who, intending all along to pursue individual claims, assert reliance on the proposed class action just long enough to validate their otherwise time barred claims." *Rahr v. Grant Thornton, LLP*, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000). Accordingly, we hold that this individual who filed a separate suit pending a decision on class certification loses the benefit of any statute of limitations tolling under *American Pipe*.

~~On the record before us, we are unable to determine whether Plaintiff Wise's individual suit was timely absent *American Pipe* tolling, because we do not know the triggering date under Washington law for the statute of limitations in her case. We therefore remand to the district court for further proceedings on this issue consistent with our opinion.~~

At the time this case was submitted for decision, the leading authority in this area was a district court opinion from the Southern District of New York. *In re WorldCom, Inc. Sec. Litig.* 294 F. Supp. 2d 431, 451 (S.D.N.Y. 2003). The Sixth Circuit agreed with the reasoning of *WorldCom* and held that *American Pipe* tolling is not available to a plaintiff who files a separate action pending class certification. *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005). So did the other district courts that dealt with the issue. *See, e.g., In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132, 1150 (C.D. Cal. 2003); *see also Wyser-Pratte Mgmt. Co.*, 413 F.3d at 569 (citing cases).

The Second Circuit, however, has vacated the district court decision in *WorldCom*. *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2nd Cir. 2007). The Second Circuit has now held that *American Pipe* tolling does apply to plaintiffs who file their actions before a decision on class certification. The Second Circuit explained that applying *American Pipe* tolling to plaintiffs who filed individual suits before certification is consistent with the purpose underlying statutes of limitations. *Id.* at 225. Statutes of limitations are intended to provide notice to defendants of a claim before the

underlying evidence becomes stale. As the Supreme Court held in *American Pipe*, however, the filing of a timely class action provides defendants with notice of the claim, so a follow-on individual suit cannot surprise defendants. *Id.*

The Second Circuit also reasoned that although the *American Pipe* doctrine protects plaintiffs from being forced to file suit before the certification decision, that doesn't mean that plaintiffs who file before certification are not entitled to tolling. *Id.* at 256. They have a right to file at the time of their choosing and denying tolling would diminish that right. We find the Second Circuit's reasoning persuasive and adopt it.

We therefore conclude that members of the plaintiff-class who have filed individual suits are entitled to the benefits of *American Pipe* tolling. This includes Bellwether Plaintiff, Wise.

VI. Medical Monitoring Claims.

Plaintiffs Pamela Durfey, Paulene Echo Hawk, and Dorothy George's only claim on appeal is for medical monitoring. They do not yet have any diseases attributable to Hanford radiation. Because in all relevant respects Plaintiffs are analogous to the plaintiffs who requested medical monitoring in 2002 in *Berg*, 293 F.3d 1127, Plaintiffs' claims were originally stayed pending this court's decision in that case.

We then decided *Berg*, in which we held that claims for medical monitoring are not compensable under the PAA, because they do not constitute claims of "bodily injury, sickness, disease, or death . . ." *Berg*, 293 F.3d at 1132-33 (citing 42

U.S.C. § 2014(q)). After our decision, Plaintiffs in this case asked the district court to remand their medical monitoring claims to state court. They claimed that *Berg* abrogated subject matter jurisdiction in federal court for all medical monitoring claims. Defendants opposed remand, arguing that *Berg* did not remove the district court's subject matter jurisdiction, but held only that a medical monitoring claim was not cognizable under the PAA.

~~Although in *Berg* we referred to bodily injury as a jurisdictional prerequisite, *id.* at 1131-33, we used the term "jurisdictional" in the loose sense, perhaps too loose, to mean that medical monitoring claims were not compensable under the PAA.~~ Although in *Berg* we referred to bodily injury as a jurisdictional prerequisite, *id.* at 1131-33, we used the term "jurisdictional" in the loose sense, perhaps too loose, to mean that medical monitoring claims were not compensable under the PAA absent physical injury. We have been guilty of such expansive use of the term before. *See Khalsa v. Weinberger*, 779 F.2d 1393, 1396 n.2 (9th Cir. 1985) (". . . jurisdiction has many possible meanings, ranging from subject matter jurisdiction to the power to grant the relief requested . . ."). ~~The district court in this case clearly had subject matter jurisdiction under the PAA to decide the issue; the district court simply did not have the power to grant the relief requested. *See id.*~~ The district court in this case clearly had subject matter jurisdiction under the PAA to decide the issue; the district court simply did not have the power to grant the relief requested because the plaintiffs have not suffered any physical injury.

The PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents. *Berg*, 293 F.3d at 1132; *In re TMI Litig.*, 940 F.2d at 854; *see also* 42 U.S.C. § 2014(hh), (w) (federal courts have jurisdiction over public liability actions, defined as "*any* suit asserting . . . *any* legal liability arising out of or resulting from a nuclear accident") (emphasis added). This result is consistent with Congress's explicit intent in enacting the 1988 Amendments and avoiding piecemeal litigation arising from nuclear incidents. We therefore affirm the district court's exercise of jurisdiction over Plaintiffs' medical monitoring claims and its conclusion pursuant to our decision in *Berg* that they were not compensable under the Act. The district court properly denied Plaintiffs' request for a remand to state court.

VII. First Bellwether Trial.

The remaining issues on appeal stem from a variety of legal and evidentiary rulings in the two trials. Three of the six Bellwether Plaintiffs, Goldbloom, Buckner, and Carlisle, lost at the first trial. Three of their evidentiary challenges constitute reversible error; the remaining arguments are meritless.

A. Causation.

We first decide whether under Washington law the district court properly instructed the jury in the bellwether trial on "but-for," and not "substantial factor," causation. Plaintiffs contend that the more lenient substantial factor test should apply because other factors could have contributed to their illnesses, such as smoking and genetics. We review the district court's application of Washington law *de*

novo, *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 883 (9th Cir. 2003), and we affirm the district court's instruction on but-for causation.

Under the PAA, Washington state law controls the standard of causation to be used in this case. *See* 42 U.S.C. § 2014(hh). ("A public liability action shall be deemed to be an action arising under section 170 [42 U.S.C. § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section."). Washington courts will depart from the standard but-for causation instruction in favor of the substantial factor test only in three rare circumstances: (1) the plaintiff was excusably ignorant of the identity of the tortfeasor who caused his injury; (2) the plaintiff probably would have been injured anyway, but lost a significant chance of avoiding the injury; or (3) the plaintiff has been injured by multiple independent causes, each of which would have been sufficient to cause the injury. *Gausvik v. Abbey*, 107 P.3d 98, 108 (Wash. Ct. App. 2005); *see also Daugert v. Pappas*, 704 P.2d 600, 605-06 (Wash. 1985).

The parties agree that the first and second exceptions are not at issue here. Plaintiffs know the identity of the tortfeasors and had no chance to avoid injury. *See, e.g.*, *Lockwood v. AC&S, Inc.*, 744 P.2d 605, 613 (Wash. 1987) (applying the substantial factor test when there is no doubt that asbestos was the cause of a plaintiff's asbestosis, but the plaintiff cannot identify which manufacturer is responsible); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684, 687 (Wash. Ct. App. 1997).

Plaintiffs therefore appear to rely on the third type of substantial factor causation, which applies when there have been "multiple, independent causes," each of which alone is sufficient to cause the injury. *Gausvik*, 107 P.3d at 108. There are two requirements they must satisfy (1) there must have been multiple causes of the injury; and (2) any one cause alone was sufficient to cause the injury. *Id.* Plaintiffs can not satisfy the second requirement. Plaintiffs instead ask us to expand the substantial factor doctrine and apply the test when there are potentially multiple causes of each plaintiff's injury, such as radiation, smoking, genetics, or pregnancy, even though Plaintiffs cannot show that Hanford radiation alone would have been sufficient to cause the injury. Their reading of Washington law would allow the substantial factor test to supplant but-for causation in virtually all toxic tort cases. Such a result is inconsistent with existing Washington law, which applies the substantial factor test in very limited circumstances. *See also* RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Proposed Final Draft 2005) (eliminating the substantial factor test). We therefore hold that the district court properly instructed the jury on but-for causation.

B. Evidentiary Rulings Constituting Reversible Error.

i. Cross-Examination of Dr. Davies.

Plaintiffs raise two issues with respect to Defendants' cross-examination of Plaintiffs' endocrinologist expert Dr. Terry Davies, in the first bellwether trial. The first issue concerns the district court's ruling that Dr. Davies could not testify that he authored articles on I-131's effect on thyroid cells.

The second issue is Defendants' cross-examination of Dr. Davies with deposition testimony of a non-testifying expert. These errors surrounding Dr. Davies' testimony, taken together, were prejudicial to Plaintiffs' case. We therefore must remand for a new trial.

With respect to Dr. Davies' pre-litigation scholarship, the district court barred Plaintiffs from asking him whether he has "published any peer reviewed articles or papers regarding the capacity of I-131 to kill or damage thyroid cells." The record reveals that the district court believed Dr. Davies could not testify about any pre-litigation articles on this subject, because Dr. Davies had not written any peer-reviewed scientific article concluding that doses at less than 100 rads can cause autoimmune disease.

This ruling was an abuse of discretion, because it deprived the jury of testimony from Dr. Davies about the extent of his pre-litigation expertise regarding causes of thyroid illness. That Dr. Davies had not written any articles specifically directed to causation below 100 rads does not mean Dr. Davies' work on causation generally was inadmissible. Plaintiffs' key witness on causation extensively researched and authored scholarship on the capacity of I-131 emissions to kill thyroid cells, and the jury was entitled to know the reach of his expertise.

Standing alone, this error might not be prejudicial; there is, however, a more serious problem with the presentation of Dr. Davies' testimony. Defendants were allowed to impeach one of Plaintiffs' key expert witnesses with inadmissible evidence, hearsay statements that Defendants

themselves successfully excluded from Plaintiffs' case-in-chief.

Prior to trial, Plaintiffs proffered the deposition testimony of epidemiologist Dr. A. James Ruttenber. According to Plaintiffs, Dr. Ruttenber would have testified that although current epidemiological studies prove only that radiation above 40 rads can cause thyroid disease, those studies do not preclude causation at lower dosages. On Defendants' motion, the district court excluded this testimony, finding it was too speculative. Having learned that the most probative part of Dr. Ruttenber's testimony was no longer admissible, Plaintiffs chose not to call him to the stand.

Plaintiffs, instead, called Dr. Davies to testify that low dosages of radiation could cause thyroid disease. Dr. Davies had relied on some of Dr. Ruttenber's dosage estimates in preparing his pretrial expert report, but he never read nor relied on Dr. Ruttenber's deposition in rendering his expert opinion. Even though Dr. Ruttenber's causation testimony has been ruled inadmissible prior to trial, defense counsel on cross-examination used Dr. Ruttenber's deposition to impeach Dr. Davies' testimony. Among many other questions, defense counsel asked the following regarding Dr. Ruttenber's deposition:

> Q: And doctor, are you aware that Doctor Ruttenber has said that the epidemiological literature can only show an increased risk of autoimmune thyroiditis down to 40 rads?. . . .
>
> Q: Did Doctor Ruttenber ever identify to you any epidemiological studies that

> reported that doses at 10 rad increased the risk of autoimmune thyroid disease?. . .
>
> Q: Yeah, and page 75 at the bottom, lines 23 to 25, "Doctor Ruttenber, is it your testimony that the epidemiology gets you down to increased risk of autoimmune thyroiditis at point 4 gray?". . . [ ] now, were you aware that Doctor Ruttenber had taken that position?"

Plaintiffs made continuing objections to this cross-examination, but the district court permitted the questions.

Dr. Ruttenber's statements should not have been used to impeach Dr. Davies because they were inadmissible hearsay on which Dr. Davies did not rely. We agree with the Fifth Circuit that reports of other experts cannot be admitted even as impeachment evidence unless the testifying expert based his opinion on the hearsay in the examined report or testified directly from the report. *Bryan v. John Bean*, 566 F.2d 541, 546-47 (5th Cir. 1978) (citing *Box v. Swindle*, 306 F.2d 882 (5th Cir. 1962)); *see also United States v. Layton*, 549 F. Supp. 903, 920-21 (N.D. Cal. 1982). Because Dr. Davies did not rely on Dr. Ruttenber's deposition, and because the trial court had excluded the deposition testimony as inadmissible hearsay, Defendants should not have been allowed to use the testimony to impeach Dr. Davies' credibility.

Defendants urge us to find that the error is harmless. Defendants, however, overlook their own emphasis on the significance of Dr. Davies' testimony and his credibility to the jury. Defendants read a large portion of Dr. Davies' cross-examination

back to the jury in closing arguments, highlighting how Dr. Ruttenber's deposition testimony rendered Dr. Davies' testimony not credible. They then stated:

> [I]f you have Ruttenber saying 40 rads as of today, based on his review of radiation epidemiology, how does Davies get away with saying at 10 rads their dose; we say it's closer to 6. How does Davies get away with offering an opinion on causation? It's just not credible.

Dr. Davies was the key witness on causation and Defendants' strategy was to cast doubt on his opinion. They did just that by improperly using Dr. Ruttenber's deposition. The prejudice to Plaintiffs was exacerbated by the court's ruling that Plaintiffs were unable to rehabilitate Dr. Davies' credibility with evidence of his pre-litigation, peer-reviewed articles on causation. Dr. Davies' endocrinologist testimony on causation was particularly probative, because Plaintiffs already had lost the key expert's epidemiological testimony, Dr. Ruttenber's opinion, regarding causation. We thus have no choice but to reverse the verdicts against Plaintiffs Goldbloom, Carlisle, and Buckner and remand for a new trial.

ii. Hurthle Cell Evidence.

There is an additional ground for reversal with respect to Plaintiff Goldbloom. The district court erred when it instructed the jury to disregard Dr. Peters' expert testimony that Goldbloom's thyroid contained Hurthle cells, which are indicative of some kind of injury to the thyroid.

Although Dr. Peters' pretrial expert report contained no evidence regarding the presence of Hurthle cells in Goldbloom's thyroid, defense counsel did not object to the testimony at trial. Partway through deliberations, the jury astutely asked whether it could consider Dr. Peters' testimony even though evidence regarding Hurthle cells was not in the expert report. The district court held a conference with the parties to discuss the jury's question. Plaintiffs argued that the jury should be able to consider the Hurthle cell evidence, because Defendants did not object to its admission at trial. Defendants argued that the court should instruct the jury to disregard the evidence, because it was not contained in Dr. Peters' pretrial report. The district court agreed with Defendants and instructed the jury to disregard the Hurthle cell testimony.

This ruling was erroneous. It is a rare circumstance when the court may exclude evidence after the close of the parties' cases. *Jerden v. Amstutz*, 430 F.3d 1231, 1236-37 (9th Cir. 2005), *amended on other grounds*, 2006 U.S. App. LEXIS 673 (9th Cir. Jan. 12, 2006). The reasons for such caution are clear. If the parties have already rested, they no longer have a chance to provide a curative response to the excluded evidence. *Id.* at 1237. They also do not have a chance to present the testimony in another fashion, such as calling an additional witness. *Id.* (citing *Bartleson v. United States*, 96 F.3d 1270, 1278 (9th Cir. 1996)). And most pertinent to this case, it is impossible to erase from the jury's minds any arguments that were made during closing summation about the belatedly-excluded evidence.

In this case, not only did Defendants fail to object to the Hurthle cell evidence, they used the evidence themselves, pointing to the testimony during closing summation as evidence that Dr. Peters was not a reliable witness. Defendants should not have been allowed to reap the benefit of a tardy exclusion of Plaintiff's evidence after they used the same evidence in their closing argument as a basis for impeachment.

The error in excluding the evidence was prejudicial. Plaintiff Goldbloom did not have an opportunity to remedy the error, because the evidence was not excluded until after the parties had rested. Her only remedy was to seek a mistrial. The error in excluding the Hurthle cell evidence, when coupled with the errors above, thus warrants a new trial.

C. Remaining Evidentiary Challenges.

Plaintiffs' remaining claims are all challenges to various evidentiary rulings. To help facilitate the bellwether process, we briefly address each, although none has merit.

i. Dr. Ruttenber's Testimony.

The district court did not err in prohibiting Plaintiffs' epidemiologist expert, Dr. Ruttenber, from testifying that scientific extrapolation supports a finding that radiation below 40 rads could cause hypothyroidism or autoimmune thyroiditis. Plaintiffs assert that the district court's rulings impermissibly required epidemiological studies to be a prerequisite to causation testimony. *See In re Hanford*, 292 F.3d 1124; *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1229-30 (9th Cir. 1998). The court's

ruling, however, did not go that far. The court only precluded Dr. Ruttenber from, first, speculating that such extrapolation would likely produce results showing causation below 40 rads, and, second, stating that current epidemiological data do not contradict or prevent such a finding. Because the data Dr. Ruttenber used to make these two conclusions were not reliable, *see Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993), the district court did not abuse its discretion in excluding Dr. Ruttenber's opinion.

ii. Alternative Causes of Thyroid Disease.

The district court also did not err in permitting Defendants to cross-examine Plaintiffs' experts on alternative causes of thyroid disease. Plaintiffs' chosen methodology for proving causation was differential diagnosis, which is a process by which an expert compiles a comprehensive list of potential causes and then engages in a process of elimination to reach the most likely cause. *See Clausen v. M/W New Carissa*, 339 F.3d 1049, 1057-58 (9th Cir. 2003). Plaintiffs' experts enumerated possible causes of Plaintiffs' diseases, such as genetic predisposition, pregnancy, and stress, and then eliminated them, leaving radioiodine as the only probable cause. Having put these alternative causes at issue, Plaintiffs could not expect Defendants not to question the experts' rejection of them. Defendants were entitled to impeach the experts' methodology and their underlying conclusions.

iii. Indemnification.

Plaintiffs challenge the district court's ruling that Plaintiffs could not tell the jury that the federal government would indemnify Defendants for any

liability imposed. Evidence of indemnification is generally inadmissible but may be used to show prejudice or bias of a witness. *See, e.g.*, FED. R. EVID. 411. The only evidence to which a question of government bias might have arisen, however, was the Hanford Environment Dose Reconstruction Project ("HEDR") and Plaintiffs stipulated to the accuracy of this document prior to trial. That stipulation is binding. *U.S. Dep't of Labor v. KerrMcGee Chem. Corp.*, 15 OSHC (BNA) 2070 (9th Cir. 1993); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). There was thus no permissible ground on which Plaintiffs could introduce evidence of indemnification. The district court did not err in its application of Rule 411.

iv. Dr. Hill's Testimony.

Plaintiffs' final contention on appeal is that the district court abused its discretion when it prohibited Plaintiffs' expert Dr. Hill from comparing radioiodine causation in animals to causation in humans. This ruling was not an abuse of discretion, because the information was not contained in Dr. Hill's pretrial expert report and Defendants were not allowed to question Dr. Hill regarding animal studies and thyroid disease at his deposition.

VIII. Rhodes' Second Trial.

Plaintiff-Appellant Shannon Rhodes suffers from several thyroid problems, the most serious of which is thyroid cancer. Pursuant to the stipulation prior to trial, Rhodes was exposed to Hanford radiation of 2.3 to 17 rads. At the bellwether trial, she offered the testimony of her expert witness, Dr. Inder Chopra, who testified that it was more probable than not that Hanford radiation caused Rhodes' cancer.

The jury failed to reach a decision on Rhodes' claims, however, and the trial court was forced to order a mistrial. In November 2005, Rhodes tried her case for a second time, and the second jury rendered a verdict for Defendants. Rhodes' appeals several legal and evidentiary rulings from her second trial.

A. Juror Misconduct.

Rhodes claims that the district court erred in denying her post-trial motion for a new trial, because the jury improperly considered extrinsic evidence during its deliberations. Rhodes proffers the signed affidavit of a juror stating that "during deliberations and immediately after the first of several votes were taken on the issue of causation, one of the jurors announced that this was Mrs. Rhodes second trial on the very issues that we were to decide and that she had lost in the first trial."

A party is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial only if the improperly considered evidence was extrinsic. *United States v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998). The district court looked at the trial record as a whole and decided that any evidence regarding Rhodes' previous trial came from accidental, off-hand comments during the second trial, and thus the evidence was not extrinsic.

We have conducted an independent review of the record, *United States v. Madrid*, 842 F.2d 1090, 1092 (9th Cir. 1988), and we affirm. There were several instances during Rhodes' trial when the first litigation was mistakenly mentioned by either a witness or an attorney and from which the jurors could have inferred that Rhodes had litigated these

same claims before and "lost." We agree with the district court that because the evidence was not extrinsic, there was no juror misconduct.

B. Voir Dire.

The district court did not err in refusing to hold an evidentiary hearing regarding possible juror misconduct during voir dire. A motion for a new trial based on juror dishonesty during voir dire requires a showing that (1) a juror failed to answer honestly a material question; and (2) a correct answer would have provided a valid basis for a challenge for cause. *Price v. Kramer*, 200 F.3d 1237, 1254 (9th Cir. 2000). Other than the affidavit, which stated that a juror admitted during deliberations that he read about Rhodes' prior trial, Rhodes does not proffer any evidence that the juror lied during voir dire. The juror who read about Rhodes' trial easily could have done so after the trial began. He also could have read about it in the medical report that was admitted as evidence, in which Rhodes' own doctor at the time of the first bellwether trial noted that Rhodes was stressed because her litigation was not going well. Rhodes has not established any juror misconduct entitling her to a new trial.

C. Reference to Impeachment Evidence as "Totally Collateral."

During trial, the district court referred to evidence presented by Rhodes to impeach a defense expert as "totally collateral." The district court later went on the record and admitted his comment was a mistake. Rhodes contends that the district court's comment unfairly prejudiced the jury in favor of the defense, entitling her to a new trial. There was no undue prejudice.

We review a judge's comments during trial for an abuse of discretion and reverse only if they "projected to the jury an appearance of advocacy or partiality." *United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001). A trial court has substantial leeway in overseeing the presentation of evidence, because it is most familiar with the dynamics of a proceeding and the dangers of jury confusion. *See, e.g., S.M. v. J.K.*, 262 F.3d 914, 919 (9th Cir. 2001). The district court's reference to certain Plaintiff's testimony as "totally collateral" when sustaining Defendants' objection, although an admitted mistake, did not project an appearance of advocacy or partiality that warrants reversal in this case.

D. "Best Estimate" Requirement.

Plaintiff next contends that the district court erred in requiring Dr. Hoffman to give a "best estimate" of the dose of radiation received by Rhodes. At the bellwether trial, Dr. Hoffman testified to a range of possible dosages for each individual with a certain percentage of confidence (i.e. a confidence interval). Defendants objected to this use of confidence intervals in Rhodes' second trial, claiming they would mislead the jury and encourage them mistakenly to believe that there was a high likelihood that Rhodes was exposed to radiation near the upper-boundary of the dosage range, when in fact, the expert was only capable of endorsing the entire range with ninety-percent confidence. Plaintiff agreed to the district court's suggestion that Dr. Hoffman testify to a range of possible dosage exposure, but also give a "best estimate" of individual dosage exposure, which was

the average of the range. Rhodes now argues that this ruling was an abuse of discretion.

The district court has discretion to exclude evidence when its probative value is substantially outweighed by the danger of misleading the jury or confusing the issues. *See* FED. R. EVID. 403. This is especially true with respect to expert witnesses. *Daubert*, 509 U.S. at 595; *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995). In reviewing the record of the pre-trial hearing and the application of the "best estimate" testimony at both trials, the district court struck a fair balance between probative and misleading testimony. It allowed Dr. Hoffman to explain his confidence interval and to give a range of possible dosage exposure. It also helped the jury focus on the significance of such an interval, by having Dr. Hoffman highlight the average of the possible range. This ruling was not an abuse of discretion.

E. Cross-Examination of Dr. Hoffman.

The district court did not abuse its discretion in allowing Defendants to cross-examine Dr. Hoffman with testimony he gave at the first bellwether trial. At the first trial, Dr. Hoffman testified to each plaintiff's "probability of causation" ("PC"). Plaintiff Rhodes apparently decided that Dr. Hoffman's testimony on this issue was more harmful than helpful, and in a pre-trial motion for her second trial, she asked the court to exclude all references by either party to Dr. Hoffman's PC analysis. Rhodes, however, still wanted Dr. Hoffman to testify on other topics.

The district court properly denied the motion. Dr. Hoffman's testimony at the first bellwether trial

was an admission of a party opponent under Federal Rule of Evidence 801(d)(2)(C). *Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422, 424-25 (1997). Plaintiff cannot now exclude trial testimony that she, herself, proffered. Defendants were properly permitted to cross-examine Dr. Hoffman on his previous PC analysis.

F. Cross-Examination of Dr. Chopra.

Rhodes next urges us to hold that the district court abused its discretion in allowing Defendants to use Dr. Hoffman's PC analysis to cross-examine Dr. Chopra and impeach her credibility. We agree with Rhodes that this ruling was an abuse of discretion, but because the error had little or no effect on the verdict, there was no reversible error.

Opposing counsel may cross-examine an expert on the facts or data on which his opinion was based. *See* FED. R. EVID. 703; *United States v. Preciado-Gomez*, 529 F.2d 935, 942 (9th Cir. 1976). Because Dr. Chopra did not rely on Dr. Hoffman's PC data, it should not have been admitted under that rule. *See, e.g., Bryan*, 566 F.2d at 547; *Layton*, 549 F. Supp. at 920; *Briggs v. Chi. G. W. R. Co.*, 57 N.W.2d 572, 583-84 (Minn. 1953).

Rhodes, however, does not show how the PC evidence could have materially affected the jury's verdict. Defendants had already undermined Dr. Chopra's credibility by highlighting the doctor's lack of due diligence in uncovering Rhodes' medical history. There is no reason to believe that Defendants' use of Dr. Hoffman's testimony had any additional, much less, any substantial effect on the verdict.

* * *

The jury's defense verdict in Rhodes' second trial must be affirmed.

IX. Conclusion.

We are mindful of the time and resources both the district court and the parties have expended in this protracted litigation. We also realize that resolution is needed. We affirm the district court's major rulings. These relate to the government contractor defense, strict liability, and causation. We also affirm the district court's ruling on the medical monitoring claims and the judgment against Plaintiff Rhodes, ~~as well as the judgment in favor of Plaintiffs Stanton.~~ as well as the judgments in favor of Plaintiffs Stanton and Wise. We reverse, on evidentiary grounds, the judgments against Plaintiffs Buckner, Carlisle, and Goldbloom~~, and on statute of limitations grounds, the judgment in favor of Plaintiff Wise~~. We remand those matters for further proceedings.

Each party to bear its own costs on appeal.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER AMENDING OPINION

April 4, 2008

The opinion in this matter filed on August 14, 2007, and published at *In re Hanford Nuclear Reservation Litigation*, 497 F.3d 1005 (9th Cir. 2007), is amended as follows.

On slip op. 9798, delete the last two sentences of the first full paragraph and replace with the following:

> We hold that any Hanford Plaintiffs who filed independent suits pending class certification are entitled to class action tolling.

On slip op. 9807, delete the last sentence of the first partial paragraph and substitute the following:

> Congress did not have the benefit of any well-established common law principles relating to the government contractor defense when Congress drafted the relevant provisions of the PAA. The Supreme Court defined the defense only a few weeks before the PAA was signed into law.

Delete the last sentence of the first partial paragraph on slip op. 9808, and substitute the following:

> We therefore conclude that the government contractor defense was not judicially well-established at the time Congress enacted the PAA.

Delete the first full paragraph on slip op. 9808, and substitute the following:

> Because Congress did not enact the PAA against a backdrop of well-established common law principles that included the government contractor defense, we cannot grant immunity from liability.
>
> Defendants argue that even if the doctrine was not judicially well-established, Congress passed the 1988 amendments to the Act with the defense in mind and intended that it apply. The defendants point to a provision in the PAA relating to underground detonation. The provision is 42 U.S.C. § 2210(d)(7), which states as follows:
>
> > A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.
>
> Defendants contend the provision demonstrates that Congress intended to

eliminate the modern government contractor defense for underground detonation and further contend that the provision demonstrates Congress intended the government contractors defense as we know it today to apply to all other claims arising out of nuclear incidents.

The language of § 2210(d)(7) is not clear. It refers to "immunity or defense" founded on the "character of the contractor or of the work." It thus appears to be referring to traditional sovereign immunity from any liability rather than the more sophisticated principles of accountability that underlie modern exceptions of governmental tort liability. *See* Federal Tort Claims Act, 28 U.S.C. § 2680(a); *Boyle*, 487 U.S. at 512.

Even assuming, however, that Congress intended to ensure that the modern defense did not apply to underground detonation claims, it does not follow that Congress also intended, without saying so, that the defense would apply in all other situations. Such a result would conflict with the Congressional statutory aim to provide compensation for nuclear injuries.

The defense is therefore inconsistent with Congressional purpose and the PAA preempts the defense for that reason as well. Congress drafted a precise, comprehensive litigation scheme for injuries sustained in a nuclear incident. The federal courts have recognized this Congressional intent. *See O'Conner v. Commonwealth Edison Co.*, 13

F.3d 1090, 1099 (7th Cir. 1994); *In re TMI Litig. Cases*, 940 F.2d 832, 854-55 (3d Cir. 1991) ("In re TMI Litig."). That scheme governs the conduct of this litigation. As the district court correctly concluded, "Congress has clearly spoken to the claims at issue in this case and its pronouncement, not a more general court-created common law defense [,] should govern the resolution of the claims." *In re Hanford Nuclear Reservation Litig.*, No. 91-3015, slip op. at 11 (E.D. Wash. Mar. 30, 2004).

Delete the last sentence of the first partial paragraph on slip op. 9820, the first partial paragraph on that page, the paragraph spanning slip op. 9820-21, and the first full paragraph on slip op. 9821. Substitute the following:

At the time this case was submitted for decision, the leading authority in this area was a district court opinion from the Southern District of New York. *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 451 (S.D.N.Y. 2003). The Sixth Circuit agreed with the reasoning of *WorldCom* and held that *American Pipe* tolling is not available to a plaintiff who files a separate action pending class certification. *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005). So did the other district courts that dealt with the issue. *See, e.g., In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132, 1150 (C.D. Cal. 2003); *see also Wyser-Pratte Mgmt. Co.*, 413 F.3d at 569 (citing cases).

The Second Circuit, however, has vacated the district court decision in *WorldCom*. *In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2nd Cir. 2007). The Second Circuit has now held that *American Pipe* tolling does apply to plaintiffs who file their actions before a decision on class certification. The Second Circuit explained that applying *American Pipe* tolling to plaintiffs who filed individual suits before certification is consistent with the purpose underlying statutes of limitations. *Id.* at 255. Statutes of limitations are intended to provide notice to defendants of a claim before the underlying evidence becomes stale. As the Supreme Court held in *American Pipe*, however, the filing of a timely class action provides defendants with notice of the claim, so a follow-on individual suit cannot surprise defendants. *Id.*

The Second Circuit also reasoned that although the *American Pipe* doctrine protects plaintiffs from being forced to file suit before the certification decision, that doesn't mean that plaintiffs who file before certification are not entitled to tolling. *Id.* at 256. They have a right to file at the time of their choosing and denying tolling would diminish that right. We find the Second Circuit's reasoning persuasive and adopt it.

We therefore conclude that members of the plaintiff-class who have filed individual suits are entitled to the benefits of *American*

Pipe tolling. This includes Bellwether Plaintiff, Wise.

On slip op. 9822, delete the first sentence of the first full paragraph and replace it with the following:

> Although in *Berg* we referred to bodily injury as a jurisdictional prerequisite, *id.* at 1131-33, we used the term "jurisdictional" in the loose sense, perhaps too loose, to mean that medical monitoring claims were not compensable under the PAA absent physical injury.

On slip op. 9822, delete the last sentence of the first full paragraph, and substitute the following:

> The district court in this case clearly had subject matter jurisdiction under the PAA to decide the issue; the district court simply did not have the power to grant the relief requested because the plaintiffs have not suffered any physical injury.

On slip op. 9836, second full paragraph, delete the phrase ",and on statute of limitations grounds, the judgment in favor of Plaintiff Wise". In the fifth sentence of that paragraph, replace the phrase "as well as the judgment in favor of Plaintiff Stanton" with "as well as the judgments in favor of Plaintiffs Stanton and Wise."

Defendant-Appellants' Petition for Rehearing En Banc, Defendant-Appellees' Petition for Panel Rehearing, and Plaintiffs' Petition for Panel Rehearing and Rehearing En Banc are denied.

No subsequent petition for rehearing or rehearing en banc may be filed.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER AMENDING OPINION

July 29, 2008

The mandate of this court, issued on April 14, 2008, is recalled. Our earlier order amending the opinion contained an inadvertent error. The opinion in this matter, filed August 14, 2007, amended on April 4, 2008, and published at *In re Hanford Nuclear Reservation Litigation*, 521 F.3d 1028 (9th Cir. 2008), is amended as follows: Delete the paragraph beginning on slip op. p. 3624 and concluding on p. 3625.

No subsequent petition for rehearing or rehearing en banc may be filed. The mandate shall issue in due course.

Filed in the U.S.
Dist. Court Eastern
Dist. of Washington
March 30, 2004
James R. Larsen,
Clerk Deputy
Spokane

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE HANFORD NUCLEAR
RESERVATION LITIGATION

ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' GOVERNMENT CONTRACTOR DEFENSE

No. CV-91-3015-WFN

This Order relates to: All Cases

A hearing on Plaintiffs' Motion to Strike Defendants' "Government Contractor" Defense [pursuant to Fed. R. Civ. P. 12(f)], filed January 16, 2004 (Ct. Rec. 1399), was held March 17, 2004, in Spokane, Washington. Peter Nordberg presented Plaintiffs' argument; Kevin Van Wart[1] presented Defendants' argument. Also present were the following counsel representing the listed parties:

---

[1] Defendants' Lead Counsel.

Plaintiffs' Lead Counsel	Louise Roselle
Plaintiffs	**Counsel**
Jaros	Roy S. Haber
Seaman	
Hamilton/Criswell	Merrill Davidoff (Telephonic)
Evenson	Arnold Levin John Cummings
Berg	Richard Eymann Steven Jones Connie Powell
Berg/Lumpkin	
Matthies	
Defendants	**Counsel**
E.I. DuPont Nemours & Co. [DuPont]	William (Randy) Squires
General Electric [GE]	
UNC Nuclear Industries, Inc. [UNC]	

The Court took the matter under advisement. The Court has reviewed the file, the briefing on the Plaintiffs' Motion to Strike, and considered the oral argument of counsel. For the reasons stated below, the Court grants the Plaintiffs' Motion to Strike the Defendants' "Government Contractor" Defense.

I. BACKGROUND

The Amended Joint Consolidated Complaint for the cases consolidated in *In Re: Hanford,* CY-91-3015-WFN, was filed August 29, 2003. Federal question jurisdiction is asserted pursuant to the Price-Anderson Act, 42 U.S.C. § 2210(n)(2).

Supplemental jurisdiction is asserted pursuant to 28 U.S.C. § 1367. The Plaintiffs' eight claims against the Defendants who operated the Hanford nuclear weapons facility are alleged to arise under the Price-Anderson Act and/or state law.[2]

Defendants' Answer to the Amended Joint Consolidated Complaint was filed September 29, 2003. The third affirmative defense, among the twelve identified, is the government contractor defense. Answer filed 9/29/03, p. 9. The fourth defense asserts that the claims are in actuality against the United States which has not waived its sovereign immunity and that the decisions made by the United States are protected by the discretionary functions exception to the Federal Tort Claims Act [FTCA], 29 U.S.C. § 2680(a). *Id.*

II. STANDARD FOR STRIKING AN AFFIRMATIVE DEFENSE

Plaintiffs argue that the government contractor defense must be stricken as it is legally inapplicable to the Plaintiffs' Price-Anderson claims. The Federal Rules of Civil Procedure authorize the Court to strike any insufficient defense. FED. R. CIV. P. 12(f)[3];

---

[2] Plaintiffs' claims include: (1) negligence; (2) absolute or strict liability; (3) trespass; (4) private nuisance; (5) public nuisance; (6) outrage; (7) negligent infliction of emotional distress; and (8) concert of action/civil conspiracy. Amended Jt. Consol. Compl., filed 8/29/03, pp. 9-16.

[3] Rule 12(f) of the Federal Rules of Civil Procedure states;

> [u]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after service of the pleading

Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." *Sidney-Vinstein*, 697 F. 2d at 885; *cf. Hart v. Baca*, 204 F.R.D. 456, 457 (C.D. Cal. 2001). Plaintiffs assert that the government contractor defense should be stricken to save the expenditure of resources that would be necessary if the issue was to be addressed simultaneously legally and factually. The courts do not favor motions to strike, however, and will grant them only if the insufficiency of the defense is clearly apparent. *Klemens v. Air Line Pilots Ass'n Intern*, 500 F. Supp. 735, 738 (W.D. Wash. 1980); 5A CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1381 p. 672, 677-78 (2d ed. 1990). Under this standard the question is whether the government contractor defense is clearly insufficient as a matter of law and should be stricken.

Defendants argue that the Motion to Strike is untimely. However, the Court may raise the issue at any time and this discretion renders the 20 day rule unimportant. FED. R. CIV. P. 12(f); *Empresa Cubana Del Tabaco v. Culbro Corp.*, 213 F.R.D. 151, 155 (S.D.N.Y. 2003). Moreover, the Court gave the

---

> upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

FED. R. CIV. P. 12(f) (West 2003).

Plaintiffs express permission to file the Motion to Strike.

III. DISCUSSION

The issue before the Court is whether the Defendants may assert the government contractor defense against Plaintiffs' Price-Anderson Act [P-AA] claims or whether the defense is clearly insufficient as a matter of law. This presents a question of first impression as no court has directly addressed the issue raised by the Plaintiffs in this case. In such circumstances, the Court's ultimate decision must comport with common sense after careful consideration is given to the statute enacted by Congress, the common law defense created by the Court, and the broader dictates of sovereign immunity and separation of powers.

Government Immunity. The United States enjoys sovereign immunity and cannot be sued unless it unequivocally waives its immunity. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). Congress waived the government's sovereign immunity in the Federal Tort Claims Act [FTCA] but excepted from the waiver discretionary decisions of the federal government. 28 U.S.C. § 2680(a); *Earles v. United States*, 935 F.2d 1028, 1030 (9th Cir. 1991). A discretionary decision is one in which a government actor, of whatever status, takes an action that involves consideration of social, economic or political policy. *Earles*, 935 F.2d at 1031. Courts have reasoned that the "principle of separation of powers requires that the judiciary refrain from interfering in those executive branch actions that involve questions of public policy, economic expediency and administrative practicality." *U.S.*

Fire Ins. Co. v. United States, 806 F.2d 1529, 1534-35 (11th Cir. 1983) (Public Vessels Act implicitly contains discretionary function exception to waiver of sovereign immunity).

An example of how the United States is shielded from suit by the discretionary function exception of the FTCA is provided by Judge Panner's decision in *Seaman v. E.I. Dupont and General Electric*, CV-88-0197-PA (D. OR 6/27/91).[4] In *Seaman*, plaintiffs sued the United States and two Hanford government contractors, E.I. DuPont de Nemours & Company and General Electric. Judge Panner held that the FTCA claims against the United States had to be dismissed because the government's decisions to discharge I-131 at Hanford were protected by the discretionary function exception to the FTCA. Claims against the government contractors were not addressed in this order and were not dismissed by the order. Here, there are no FTCA claims asserted against the United States. The United States is not a Defendant. The claims are brought against the Hanford government nuclear contractors under the P-AA.

Government Contractor Defense. "Federal courts, unlike state courts, are not general common-law courts . . . ." *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312 (1981). If state law is to

---

[4] Local Rule 7.1(g) (2) precludes parties from citing unpublished cases unless limited exceptions exist, none of which apply in this case. Therefore, Defendants' citation to *Seaman* was barred by Local Rule. Since the case was raised as one related to this litigation, however, the Court will briefly discuss the limited holding of the case.

be displaced, elected representatives of Congress generally do so, not federal courts. *Id.* at 313. In a few instances, where there is an absence of an applicable statute, federal common law has been developed, but the Supreme Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *Id.* at 313 *quoting New Jersey v. New York*, 283 U.S. 336, 348 (1931).

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Court determined that a federal common law government contractor defense should be created to fill a void where no explicit statutory directive existed. 487 U.S. at 504. This defense is available to a contractor who performed according to a contract with the United States, when the contractor's performance would render it liable under state law. *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444, 448 (9th Cir. 1983). The state law is effectively preempted by the federal common law defense. The defense applies to both performance and procurement contracts. *Boyle*, 487 U.S. at 506 (military procurement contract).

Defendants argue broadly that considerations of sovereign immunity apply to government contractors. The government contractor defense, however, is not an extension of sovereign immunity. Justice Brennan dissented in *Boyle*, arguing that official [sovereign] immunity should not be extended to government contractors. *Id.* at 524. The majority noted that the issue of extending immunity to government contractors was not before the Court. *Id.* at 505 n.1. Citing *Boyle*, the Ninth Circuit has thus concluded that "the government contractor

defense does not confer sovereign immunity on contractors." *United States ex rel Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004). Like the FTCA however, the government contractor defense, if applicable, prevents the courts from second guessing government discretionary decisions. *Boyle*, 487 U.S. at 511.

Boyle set forth two legal prerequisites to the application of the government contractor defense and three factual elements. State law will be displaced or preempted by the federal common law only if (1) the subject matter involves "uniquely federal interests"; *id.* at 5504, and (2) "a significant conflict exists between an identifiable federal policy or interest and the operation of state law or the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (internal quotations, parentheticals, and citations omitted).

To define a "significant conflict" the Court in *Boyle* referenced the discretionary function exception to the government's waiver of its sovereign immunity under the FTCA. *Boyle*, 487 U.S. at 511. This caused the Ninth Circuit to observe that the defense is intellectually moored to the discretionary functions exemption of the FTCA. *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454 (9th Cir. 1990). A significant conflict exists if the government's decisions are discretionary functions. *Boyle*, 487 U.S. at 512. Plaintiffs correctly note that the *Boyle* decision did not hold that the FTCA actually applied to actions against government contractors. If it had, there would have been no need to develop a common law defense for the government

contractor who was acting in compliance with government discretionary decisions.

The *Boyle* court held that the three factual elements that must be satisfied provided the two legal prerequisites are met, are that: (1) the United States approved reasonably precise specifications; (2) the contractor conformed to the specification; and (3) the contractor warned of dangers if knew of which were unknown to the Government. *Id.* at 512.

Price-Anderson Act. In 1957, thirty-one years before the *Boyle* Court defined the contours of the government contractor defense, Congress enacted the P-AA. The Act specifically addresses when nuclear operators have liability for nuclear accidents. The two major objectives of the P-AA are:

> to assure adequate public compensation in the case of a nuclear accident; and
>
> to set a limit on the liability of private industry to remove a major deterrent to private participation in the development of nuclear energy.

S. REP. NO. 100-70, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1426, *cf. Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978). Congress clearly noted that "[t]he primary concern of the Federal Government is with the protection of the people who might suffer damages from the new atomic energy industry." S. REP. NO. 85-296 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1803, at 1816.

Originally Congress fashioned the Act so as not to create a federal cause of action. *Id.* at 1810. It relied on state law to determine

damages to the public. *Id.* It channeled liability to the nuclear operators and established a combination of mandatory private insurance (for the operators and those associated with them) and an indemnification of the operator. *Id.*; *Duke Power*, 438 U.S. at 64-65.

In 1966 the P-AA was amended to address Congress's concern that state laws might prevent a person damaged from a nuclear incident from obtaining rapid and adequate financial compensation. S. REP. NO. 1966 89-1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201, 3203-04. Congress amended the Act to allow the government to contractually require operators to waive certain key defenses related to fault and statute of limitations and defenses as to charitable or governmental immunity but only in the case of a serious event or "extraordinary nuclear occurrence" [ENO]. S. REP. NO. 89-1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201, 3201-02, 3209; *Duke*, 438 U.S. at 66 n.5; *see* 42 U.S.C. § 2210(n) (1).

Congress again amended the Act in 1988 to "better achieve the goal of providing in advance of any nuclear incident a mechanism for full compensation of the public that is equitable, efficient, reliable, and comprehensive." S. REP. NO. 100-218, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1479. In response to difficulties experienced following the Three Mile Island nuclear incident, Congress provided for the consolidation of claims arising out of a nuclear incident in federal district court. *Id.* at 13, 1488; *codified at* 42 U.S.C. § 2210(n) (2); *El*

Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 477 (1999). The federal court was given original jurisdiction as well as removal jurisdiction over all public liability actions. *Neztsosie*, 526 U.S. at 477. As a result, any claims that grow out of a nuclear incident are only compensable under the P-AA. *In Re Berg Litigation*, 293 F.3d 1127, 1132 (9th Cir. 2002) *citing In Re Three Mile Island Litigation*, 293 F.2d 832, 854 (3d Cir. 1991) ("After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all.") Although the claims must be addressed in federal court, the "underlying rules of decision are to be derived from state law." *In Re Three Mile Island Litigation*, 940 F.2d at 854; *cf.* 42 U.S.C. § 2014(hh).[5]

Interface Between P-AA and the Government Contractor Defense. Having considered sovereign immunity, the general

---

[5] 42 U.S.C. § 2014(hh) provides

> [t]he term "public liability action," as used in § 170 [42 U.S.C.S. § 2210], means any suit asserting public liability. A public liability action shall be deemed to be an action arising under § 170 [42 U.S.C.S. § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C.S. § 2014(hh) (1996).

contours of the government contractor defense, and the history of the P-AA, the Court turns its attention to the relationship between the P-AA and the government contractor defense. There are at least four reasons causing the Court to conclude that the Defendants may not assert the government contractor defense against Plaintiffs P-AA claims, i.e., why the defense is clearly insufficient as a matter of law and should be stricken.

First, the Price-Anderson Act displaces the inconsistent common law defense. When *Boyle* recognized a common law government contractor defense, the Court noted that it was doing so because there was an absence of statutory direction. *Boyle*, 487 U.S. at 504. The Price-Anderson Act, however, is an extraordinarily comprehensive statutory compensation and liability scheme governing claims against nuclear operators growing out of nuclear incidents. *El Paso Nat'l Gas Co. v. Neztsosie*, 526 U.S. 473, 485 (1999); *In Re Berg Litigation*, 293 F.3d 1127, 1132 (9th Cir. 2002); *In Re TMI Litigation Cases Consolidated II*,940 F.2d 832, 872 (3d Cir. 1991). To displace federal common law a statute does not have to proscribe the use of the federal common law, but the legislative scheme must speak directly to the question. *Milwaukee*, 451 U.S. at 315; *United States v. Texas*, 507 U.S. 529, 534 (1993). This comprehensive Act speaks directly to the question of nuclear operator liability. While the P-AA does not proscribe the use of the government contractor defense, it supersedes

the common law defense. Separation of powers concerns support elected officials declaring the law as opposed to unelected courts. *Milwaukee*, 451 U.S. at 313. Here Congress has clearly spoken to the claims at issue in this case and its pronouncement, not a more general court-created common law defense should govern the resolution of the claims.

In addition, application of the government contractor defense would operate to thwart the intent of the Act The Act removed Plaintiffs' state law claims, placed them in federal court, and directed the claims to the indemnified nuclear operators. To allow already indemnified government contractors to disclaim their liability under a federal common law defense is inconsistent with the goal of the P-AA to provide compensation to victims of nuclear accidents.

Second, P-AA indemnification for nuclear operators stands in sharp opposition to application of a government contractor defense. The Court in *Boyle* created the government contractor defense to protect government contractors from liability under state law. *Boyle*, 487 U.S. 500. Congress took a very different approach in the P-AA and channeled liability to the nuclear operators but then provided the operators with indemnification. 42 U.S.C. § 2210. The elaborate scheme removes all financial disincentives for the nuclear operators. Thus, the government is able to secure nuclear contractors while allowing for the imposition of liability under state law. The very fact that indemnification is provided

argues against a need for any immunity. *See Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1014 (5th Cir. 1969); *Group Health, Inc. v. Blue Cross Ass'n*, 625 F. Supp. 69, 76 (S.D.N.Y. 1985). The Defendants' argument that government nuclear contractors are both indemnified by the government under the P-AA and immune to liability by application of the government contractor defense defies common sense.

Third, language and legislative history of the P-AA does not support application of the government contractor defense to P-AA claims. The 1988 Amendments Act provided that the substantive rules of decision on a P-AA claim shall be derived from State law "unless such is inconsistent with the provisions of such section." 42 U.S.C. § 2014(hh). The Ninth Circuit has interpreted this language to mean that state law is only preempted if it conflicts with § 2210. *Kennedy v. So. California Edison Co.*, 268 F.3d 763, 767 (9th Cir. 2001), *cert. denied*, 535 U.S. 1079 (2002); *see also, Carcoran v. New York Power Authority*, 202 F.3d 530, 537 (2d Cir. 1999) (same). The government contractor defense was created by the federal court and is not derived from State law. Thus, it would be applicable to P-AA claims only if the defense was somehow incorporated into § 2210 of the Act. The defense, however, is not mentioned by the Act.

The only mention of defenses in the Act is in the 1966 Amendments. 42 U.S.C. § 2210(n) (1) allows the government to contractually require

nuclear operators to waive "charitable" and "government immunity" defense for ENOs, but it is silent as to no-*ENOs*.[6] However, the government contractor defense does not fall within the statutory reference to "government immunity" defenses. A contractor is not the government and does not have sovereign immunity. *See United States ex rel. Ali*, 355 F.3d at 1146 (the government contractor defense is not an extension of sovereign immunity). So the language regarding waiver of immunity defenses for ENOs does not support Defendants' argument that Congress intended to allow government contractors to avail themselves of a government contractor defense in a non-ENO situation such as this case.

Why Congress would require a waiver of "charitable" and "government immunity" defenses is understandable in light of Congress's concerns. In 1966, claims under the P-AA would be addressed in state court as a federal cause of action had not yet been established. Congress was concerned that the assertion of defenses under state law (whether meritorious or not) would delay satisfaction of claims.[7] Thus, it

---

[6] In 1966, the nuclear industry wanted to be able to "assert defenses permitted by state law" for spurious claims. S. REP. NO. 89-1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201, 3211.

[7] [t]he [Joint Committee] is equally determined that the promise to the public, contained in the Price-Anderson Act, will not prove to be an illusory one. It is the clear intent of this legislation that if a member of the public ever is injured by a nuclear incident, he will not be subjected to a series of

required contractors to waive a number of defenses in ENO situations.

Defendants submit the federal nuclear safety regulations are applicable to P-AA claims. *See e.g., Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998). It does not follow that judicially-created federal common law defenses would therefore necessarily also be applicable to P-AA claims.

Fourth, cases cited by Defendants in support of application of a government contractor defense to Plaintiffs' P-AA claims are not controlling and are distinguishable. In the two cited district court cases with P-AA claims, the government contractor defense was asserted. *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959 (W.D. Ky. 1993); *Crawford v. Nat'l Lead Co.*, 784 F. Supp. 439 (S.D. Ohio 1989). In neither of these cases, however, did the plaintiffs argue, as they do here, that the defendants were precluded from asserting the government contractor defense as a matter of law. Thus, neither case directly addresses the issue before this Court.

In *Crawford*, the plaintiffs argued that the government contractor defense did not apply to the facts. There the government contractor violated federal environmental statutes. The

---

substantive and procedural hurdles which would prevent the speedy satisfaction of a legitimate claims.

S. REP. NO. 89-1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201, 3204.

court found no significant conflict between the federal interest and the state tort law so the contractors were precluded from asserting the government contractor defense. *Crawford,* 784 F. Supp. at 447.

In *Lamb,* the district court noted that usual defenses, including the government contractor defense, were available in response to P-AA claims resulting from a non-ENO. *Lamb,* 853 F. Supp. at 962, 966. Defendants' motion for summary judgment was denied as a question of fact existed as to whether the defendants satisfied the third element of the government contractor defense. *Id.* at 968.

IV. CONCLUSION

The Court has determined as a matter of law that the Defendants may not assert the government contractor defense against Plaintiffs' Price-Anderson claims. Thus, the clearly insufficient government contractor defense may be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Defendants assert that they are unfairly deprived of the opportunity of submitting facts in a summary judgment motion to show that they satisfy the requirements of the government contractor defense set forth in *Boyle,* 487, U.S. 500. The Court's decision regarding the unavailability of the defense as a preliminary legal matter however, fulfills the purpose of Rule 12(f) of avoiding the expenditure of resources addressing factual issues that would necessarily be mooted by the legal determination.

The United States has sovereign immunity, but the United States is not a Defendant in this action. The Plaintiffs have brought suit against the government nuclear weapons contractors who operated the Hanford facility. Congress has provided a comprehensive scheme, the Price-Anderson Act to address such claims, a scheme that seeks to provide compensation to the victims of nuclear incidents while indemnifying the nuclear operators. It would be inappropriate to allow the government contractors in this case to assert a court-crafted federal common law defense to liability which is both inconsistent with the Act's indemnification scheme and would thwart the compensation goal of the Act. Congress has repeatedly stated its intent that the P-AA provide "full compensation of the public that is equitable, efficient, reliable, and comprehensive." S. REP. NO. 100-218, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1479. Moreover, the language and legislative history of the statute does not support the Defendants' claim that the government contractor defense is applicable to the Plaintiffs' P-AA claims. No court has addressed the issue presented, but this Court after due consideration is firmly convinced that its decision reflects the correct legal determination and comports with common sense. Accordingly,

IT IS ORDERED that:

1. The Plaintiffs' Motion to Strike Defendants' "Government Contractor" Defense [pursuant to Fed. R. Civ. P. 12(f)], filed January

16, 2004, Ct. Rec. 1399, is **GRANTED**. The Defendants' Third Affirmative Defense, the government contractor defense, identified in Defendants' Answer filed September 29, 2003, page 9, Ct. Rec. 1345, is **STRICKEN**.

2. At the parties' request, the Seventh Status Conference shall be **SET for June 3, 2004, at 8:00 a.m., in Spokane, Washington.**

The District Court Executive is directed to file this Order and provide copies of Liaison Counsel, Mediator Gary Bloom, and the four pro se Plaintiffs.

DATED this 30th day of March, 2004.

/s/
WM. FREMMING NIELSEN
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE HANFORD NUCLEAR
RESERVATION LITIGATION

ORDER RE: PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT – ABNORMALLY
DANGEROUS ACTIVITY

No. CV-91-3015-WFN

This Order relates to: All Cases

At the tenth status conference on October 28, 2004, the Court reserved ruling on Plaintiffs' Motion for Summary Judgment—Abnormally Dangerous Activity, filed September 9, 2004 (Ct. Rec. 1564). Argument was presented by Peter Nordberg for the Plaintiffs and William (Randy) Squires for the Defendants.[1]

The Court has reviewed the file, all materials submitted on the Motion, considered the oral arguments of counsel, and is fully informed. For the reasons stated below, the Motion is granted.

I. DISCUSSION

The Plaintiffs' Motion requires the Court to determine whether the chemical separation that

---

[1] *See* Tenth Status Conference Order: October 28, 2004, filed 11/01/04 (Ct. Rec. 1602) for listing of additional counsel present at the hearing.

occurred in the Hanford plutonium production process is an abnormally dangerous activity. The chemical separation created radioactive I-131 that was released into the air by Defendants DuPont and General Electric[2] and allegedly caused thyroid disease in the Plaintiffs. If the activity is abnormally dangerous then the Defendants may be held strictly liable for Plaintiffs' damages, regardless of whether Defendants exercised the utmost care in the conduct of their activities at Hanford.

Plaintiffs have moved for partial summary judgment on this issue of liability pursuant to Rule 56©) of the Federal Rules of Civil Procedure. A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). Here however, the parties are in agreement that the question of whether Defendants' were engaged in an abnormally dangerous activity is a question of law for the court. *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 861 (1977). They also agree that the facts

---

[2] Defendants DuPont and General Electric will be referred to collectively as Defendants in this Order.

upon which the Court must make its legal determination are not facts that a jury must decide. Restatement (Second) of Torts [Restatement] § 520 (1977) Comment l (the issue "is no part of the province of the jury to decide"). Thus, since the material facts are generally not disputed, and disagreement is over the inferences to be drawn from the facts, the Court is permitted to draw the inferences and reach a legal conclusion. If factual disputes exist, the Court is permitted to weigh the facts. The Court will construe all facts in favor of the Defendants as the non-moving party and all justifiable inferences will also be drawn in their favor. *Anderson*, 477 U.S. at 255.

The Defendants argue that summary judgment should not be granted because the record is not complete. The Court disagrees. Both parties had sufficient opportunity to present a complete factual record on this dispositive motion. Further, both parties submitted significant documentary evidence in support of their statement of facts. There is enough evidence in the record for the Court to determine the issue.

Abnormally Dangerous Activity. In this Price-Anderson Act [P-AA] action, the substantive rules for decision are derived from state law unless that law is inconsistent with the provisions of § 2210 of the P-AA. 42 U.S.C. § 2014(hh). "In Washington, [the] court has adopted the Restatement (Second) of Torts [Restatement] §§ 519, 520" (1977) which deal with the imposition of strict liability for abnormally dangerous or ultra-hazardous activities. *Langan*, 88 Wash. 2d at 860. Section 519 of the Restatement provides:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm the possibility of which makes the activity abnormally dangerous.

Restatement, § 519, p. 34. Section 520 of the Restatement lists the factors to be considered in determining whether an activity is abnormally dangerous:

> (a) existence of high degree of risk of some harm to the person, land, or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement, § 520, p. 36.

In determining whether an activity is abnormally dangerous, the Court is to consider all of the factors, but all do not have to weigh equally in favor of characterizing an activity as abnormally dangerous

in order for the Court to determine that the activity is subject to strict liability. *Langan*, 88 Wash. 2d at 861. However, one factor alone is not necessarily sufficient for a finding that the activity is abnormally dangerous. *Id.*" The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it, even though it is carried on with all reasonable care." *Id.* at 862, quoting Restatement § 520, comment f. After a review of all the factors which will be discussed *infra*, this Court concludes that this essential question must be answered in the affirmative. Even though the Defendants may have exercised all reasonable care in the chemical separation activity, which was necessary to the production of plutonium for the World War II atomic weapons, the risk of harm to the downwind population was so unusual that under Washington law strict liability should be imposed for harm that resulted from the activity.

In Washington, an assessment of the § 520 factors has resulted in the imposition of strict liability for fire work displays, *Klein v. Pyrodyne Corp.*, 117 Wash. 2d 1 (1991); pile driving where injury occurred to the property on an adjacent lot, *Vern J. Oja & Assoc. v. Washington Park Towers, Inc.*, 89 Wash. 2d 72 (1972); for aerial spraying of crops, *Langan*, 88 Wash. 2d 855; and for a common carriers' transportation of large quantities of gasoline, *Siegler v. Kuhlman*, 81 Wash. 2d 448 (1972). Under the same analysis of factors of § 520, Washington courts have held that the following

activities are not abnormally dangerous including the transmission of electricity, *Dorsch v. City of Tacoma*, 92 Wash. App. 131 (1998); the selling of handguns, *Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wash. App. 267 (1988); ground damage caused by the crash landing of aircraft, *Crosby v. Cox Aircraft Co. of Washington*, 109 Wash. 2d 581 (1987); and the transmission of natural gas, *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 34 Wash. App. 25 (1983).

In several cases the courts have found activities to not be abnormally dangerous based upon the fact that the harm caused by the activity was not the harm which made the activity abnormally dangerous. Restatement § 519(2). For instance, blasting operations might be held to be abnormally dangerous if harm was caused from flying debris but when minor vibrations and noise frightened a mother mink and caused her to kill her kittens, strict liability was not imposed. *Foster v. Preston Mill Co.*, 44 Wash. 2d 440 (1954). This was because the minor vibrations and noise were not the kind of harm that made the activity ultra-hazardous. Similarly, while explosives and the handling of the same are often considered abnormally dangerous, the courts have held that detonation of explosives that were stolen and transported 300 miles away before being detonated would not result in strict liability for the corporation from whom the explosives were stolen. *Washington State Univ. v. Indus. Rock Products, Inc.*, 37 Wash. App. 586 (1984). Again, the harm that resulted was not the kind of harm that made the use and storage of the explosives abnormally dangerous. Here, the

asserted harm of thyroid disease is one of the harms the possibility of which would make Defendants' chemical separation process abnormally dangerous.

The Court will address each of the factors of § 520.

(a) High Degree of Risk of Some Harm. The comment to § 520 related to factors (a) and (b) provides the following regarding the application of these factors:

> An activity that is abnormally dangerous ordinarily involves a high degree of risk of serious harm to the person, land or chattels of another. The harm threatened must be major in degree, and sufficiently serious in its possible consequences to justify holding the defendant strictly responsible for subjecting others to an unusual risk. It is not enough that there is a recognizable risk of some relatively slight harm, even though that risk might be sufficient to make the actor's conduct negligent if the utility of his conduct did not outweigh it, or if he did not exercise reasonable care in conducting it. If the potential harm is sufficiently great, however, as in the case of a nuclear explosion, the likelihood that it will take place may be comparatively slight and yet the activity be regarded as abnormally dangerous.

Restatement § 520, comment g, p. 38.

The focus of inquiry for the Court regarding whether there was an abnormally dangerous activity relates to the activity carried on by the Defendants.

Restatement § 520, comment l, pp. 42-43. The question of whether the activity created a high degree of risk that had serious potential consequences is separate from the question of causation – did the activity actually cause the bellwether Plaintiffs' illness? Thus, even though Defendants assert that the doses were too low to cause illness, that would not mean that there was no risk.

The Plaintiffs assert that the release of large quantities of radioactive substances carried a great risk of harm to human health. They argue that the Defendants knew of the releases' risk to health and that even later technology did not prevent emissions of the radioactive substances. The Defendants argue that they would have to have had knowledge based on scientific studies that I-131 caused thyroid cancer and hypo-thyroidism in order to be held strictly liable. Plaintiffs correctly note that the Restatement and Washington cases fail to set forth this highly specific requirement. Even in the negligence context, foreseeability is found if the harm falls within a general field of danger which should be anticipated. *Hetzel v. Parks*, 93 Wash. App. 929, 938 (1999).

The facts presented by the parties related to this factor are as follows:

1) Hanford Created I-131 and Released it Into the Air. It is undisputed that the plutonium production process included chemical separation which created radioactive I-131 that was released into the air. Most releases of I-131 occurred between December, 1944 and December, 1947. The Hanford Environmental Dose Reconstruction Project [HEDR]

estimated that 740,000 curies of I-131 were released between 1944 and 1992. Πs' SOF 12-13; Δs' SOF 43.[3]

2) The Scientific Community Knew of I-131 and Thyroid Connection and Cancer Risk of Radiation. The state of scientific knowledge was: in 1941 that I-131 would concentrate in the thyroid, Πs' R-SOF 2; in the early 1940s that radiation could cause cancer, Πs' R-SOF 3 (1942), Πs' R-SOF 6 (1941); and in 1942 that hypothyroidism could follow radiation treatment of the thyroid, Πs' R-SOF 6.

3) Defendants Generally Knew of Physiological Risks. Both DuPont (in 1943) and General Electric (in 1946) were reluctant to become involved in plutonium production. Δs' SOF 3, 5. Both companies recognized significant potential liability due to physiological hazards resulting from the endeavors and sought to be released from liability. Πs' SOF 17, 23.[4]

4) Defendants Knew of the I-131 and Thyroid Connection. Specifically, Met Lab scientists working with Hanford noted in March of 1943 that releases of I-131 could cause damage by the concentration of the

---

[3] The parties' Statement of Material Facts are referenced as follows: Plaintiffs' Statement of Facts in Support of their Motion: Πs' SOF #; Defendants' Statement of Facts in Response to Plaintiffs' Motion: Δs' SOF #; Plaintiffs' Statement of Facts on Reply: Πs' R-SOF #.

[4] Defendants point out that the contracts were for $1.00 implying that it would not be fair to impose strict liability on a contractor who acted out of a sense of patriotic duty. The Restatement § 520 comment d advises however that strict liability applies even when there is not financial benefit to the actor.

iodine in the thyroid. Πs' SOF 18, 19; *see also* Πs' SOF 20, 22. In November 1943, Met Lab recognized that this could result in the possible destruction of the thyroid. Πs' SOF 21. In 1943, Met Lab had a fear that the iodine would be released and noted that they could protect the thyroid gland from the I-131 by administering potassium iodine pills. Πs' R-SOF 9-11. In March, 1944, Met Lab planned medical research projects to look for cancer and other long-term effects of radiation. Πs' R-SOF 4.

5) Defendants Attempted to Control I-131 Emissions with Variable Success. In addressing the risks, scientists established a safety level of one rad per day of I-131 exposure. Δs' SOF 12-14. They attempted to keep well below the tolerance levels but admitted scattered readings of 2 to 2½ times the tolerance levels. Δs' SOF 15; Defendants' Exh. 7, p. 1. Met Lab recommended to the contractors a cooling time of 54 to 62 days to allow the iodine to decay before chemical separation. Πs' R-SOF 13. At the T plant, however, the average cooling time in December, 1944 was 32.7 days. At the same plant in 1945, the cooling time for six months was less than 40 and for nine months was less than 50 days. Similarly, at the B plant in 1945, in six of the nine months of operation the cooling time was less than 40 days and in all nine months was less than 50 days. Πs' R-SOF 15.

6) Defendants Said There Was No Risk with the Emissions but Acknowledged the Need for More Information. In 1945, Hanford scientists stated that there was no inhalation risk from I-131 and the ingestion of I-131 deposited on plants did not pose a risk to humans. Δs' SOF 18, 19, 24. This same

conclusion was drawn in 1948 and 1950 though a danger to grazing animals was acknowledged. Δs' SOF 21, 22. But more knowledge was admittedly needed to determine what amount of contamination was safe. Defendants' Exh. 25, p. 115. Hanford conducted studies of workers' thyroids in 1945 and found no readings above 1/100th of the thyroid tolerance dose. Δs' SOF 23.

7) The scientific community was aware and the Defendants likely knew of the milk route risk. As to the milk route, it was known as early as 1925 that iodine in the diet of milk cows was transferred to their milk. Πs' SOF 27. In 1955, the Director of Radiological Science Department at Hanford said that since the first year of Hanford operations, it was known that the permissible levels of radioactive iodine in the atmosphere was too high because ingestion and not inhalation was the problem including "drinking of milk from cows on contaminated pastures," and that for children, the intake of milk should likely be less than two quarts per day. Πs' R-SOF 20; Plaintiffs' Reply Exh. P. Based upon these facts, the Court concludes that Defendants were engaged in an unusual activity that caused significant early releases of I-131 which in turn created a risk of some harm in the form of illnesses to exposed humans. Whether the risk was very high (as Plaintiffs state) or not very high (as Defendants urge) is immaterial as the potential harm was very serious as will be discussed infra so a lower risk is sufficient. Restatement, § 520, comment g, p. 38.

(b) Likelihood That the Harm That Results from it Will Be Great. The question presented by

this factor is whether the harm resulting from emissions of large quantities of I-131 would be serious or major harm, that is harm with serious consequences. *See* Restatement § 520 Comment g, p. 38. Plaintiffs assert that the harm in the form of illness is great relying upon *In Re: Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1137 (9th Cir. 2002) ("Radiation is capable of causing a broad range of illnesses, even at the lowest doses.") and R.C.W. 70.99.010 (finding that radioactive wastes are dangerous to the health and welfare of people). The Defendants argue that Plaintiffs aren't specific enough as to the health conditions at issue in this case and have provided no evidence that I-131 causes the conditions. As discussed previously however, the thyroid conditions Plaintiffs allege are within the general type of harm posed by releases of I-131 and evidence on causation is not relevant to the question presented by Plaintiffs' Motion.

The facts presented by the parties related to this factor are as follows:

1) Bellwether Plaintiffs Received Some Dose of I-131. This fact is undisputed. Πs' SOF 29.

2) The Hanford Thyroid Disease Study [HTDS] Shows the Same Risk of Thyroid Disease Regardless of Dose and There Doesn't Appear to Be an Increased Risk of Thyroid Disease from Exposure to I-131. Δs' SOF 31. As discussed under factor a, the harm potentially associated with I-131 is thyroid disease which has been described as serious and includes cancer. An Environmental Protection Agency publication presented by the Defendants also states "[l]ong term (chronic) exposure to radioactive iodine can cause nodules, or cancer of the thyroid.

Δs' Exh. 34, p. 4. Although the HTDS found no increase in disease (which relates to the likelihood Plaintiffs' diseases were caused by Hanford emissions), that doesn't negate the proposition that the potential harms were serious for purposes of an abnormally dangerous activity evaluation under factor b. The Court concludes that the I-131 emissions could result in potentially serious illnesses with serious consequences.

(c) Inability to Eliminate the Risk by the Exercise of Reasonable Care. The Restatement comments advise that:

> Most ordinary activities can be made entirely safe by the taking of all reasonable precautions; and when safety cannot be attained by the exercise of due care there is reason to regard the danger as an abnormal one.
>
> There is probably no activity, unless it is perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions, and the exercise of the utmost care, particularly as to the place where it is carried on. Thus almost any other activity, no matter how dangerous, in the center of the Antarctic continent, might be expected to involve no possible risk to anyone except those who engage in it. It is not necessary, for the factor stated in Clause ©) to apply, that the risk be one that no conceivable precautions or care could eliminate. What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all

> reasonable precautions in advance and has exercised all reasonable care in his operation, so that he is not negligent.

Restatement § 520 comment h, pp. 38-39. In sum, an operation that exercises due care to control risks and can do so is an ordinary activity while the operation that cannot control all risks is an abnormal activity.

Plaintiffs argue that the Defendants have impliedly admitted that they could not control the risk of I-131 releases because Defendants assert they were not negligent and contend that they set cooling temperatures at the safest practical level to reduce emissions yet the missions occurred. The Defendants respond that since I-131 has a half life of eight days, longer cooling times could have reduced the risk of I-131 emissions, thus the risk was avoidable. It was only because shorter cooling times were used so that the plutonium could be produced faster for military uses that I-131 was emitted.

The facts presented on this factor establish that:

1) Defendants Acted Prudently. Project engineers acted prudently and reasonably and alternative technologies suggested by the Plaintiffs were not reasonably available or inappropriate for reducing emissions. Πs' SOF 35.

2) Longer Cooling Time would Reduce I-131 Emissions. Longer cooling times could reduce the volume of I-131 emitted. Πs' SOF 36.

3) Military Demand for Plutonium Required Shorter Cooling Times. Given the need for plutonium for atomic weapons the cooling times

were often shorter than desirable to reduce I-131 emissions. Δs' SOF 34; Πs' R-SOF 14-15.

While longer cooling times could have theoretically reduced emissions of I-131, that outcome was impossible to achieve given the pressure to produce the plutonium for the war effort. Under the actual circumstances in which this I-131 was created, the risk of emissions was unavoidable. The Court concludes that this factor weighs in favor of a finding of an abnormally dangerous activity.

(d) Extent to Which the Activity Is Not a Matter of Common Usage.

The Restatement comment provides the following guidance in assessing this factor:

> An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. . . . Certain activities, notwithstanding the recognizable danger, are so generally carried on as to be regarded as customary. Thus automobiles have come into such general use that their operation is a matter of common usage. . . .
>
> Although blasting is recognized as a proper means of excavation for building purposes or of clearing woodland for cultivation, it is not carried on by any large percentage of the population, and therefore it is not a matter of common usage.

Restatement § 520 comment I, pp. 39-40.

Plaintiffs argue that the production process certainly was not a common usage during the time period at issue in this case. In response, the

Defendants argue that while the production of plutonium for use in atomic weapons was not a common activity, the chemical separation and air dilution and venting through a tall stack were common endeavors based on the science of the time. As to I-131, the Defendants argue also that existing knowledge was used to make the emissions safe.

The undisputed facts are as follows:

1) Plutonium Production was a Totally New Endeavor. Plutonium production operations were an entirely new endeavor. Πs' SOF 40.

2) Chemical Separation Used in Other Settings. Chemical separation techniques had been used in other industrial settings. Δs' SOF 35.

3) X-Ray Radiation Used in Medical Diagnosis and Treatment. X-ray radiation had been used in the 1960s to treat thyroid disease and specifically I-131 continues to be used in nuclear medicine. Δs' SOF 36.

Although radiation had seen medical usage and chemical separation had been used before, it is still undisputed that the weapons grade plutonium production which included chemical separation that released I-131 was an activity in which few people were engaged. As such it was not one of common usage and this factor weighs in favor of a finding of an abnormally dangerous activity.

(e) Inappropriateness of the Activity to the Place Where it Is Carried On. The Restatement provides the following guidance on this factor:

> Another factor to be taken into account in determining whether an activity is abnormally dangerous is the place where it

> is carried on. If the place is one inappropriate to the particular activity, and other factors are present, the danger created may be regarded as an abnormal one.
>
> Even a magazine of high explosives, capable of destroying everything within a distance of half a mile, does not necessarily create an abnormal danger if it is located in the midst of a desert area, far from human habitation and all property of any considerable value.

Restatement § 520 comment j, p. 41.

The question presented on this issue is whether the location of Hanford was inappropriate for the activity to be conducted. Plaintiffs do not dispute that the location for Hanford may have been as safe as any in the continental United States. They argue, however, that if an activity will pose great health risk wherever it is conducted, this factor should weigh in favor of a finding of an abnormally dangerous activity. The Defendants assert that the Plaintiffs have no evidence that the activity posed a grave health risk or would be dangerous wherever sited.

The undisputed fact specifically identified as to this factor is that: Hanford Was Sited at the Only Good Location that Could Be Found. Πs' SOF 42; Δs' SOF 37.

The fact that Hanford may have been the only good location for the activity is not dispositive of the question of whether the site was appropriate for the activity of chemical separation that would undisputedly release I-131 into the air. In the Washington case of *Langan v. Valicopters*, an

organic farming enterprise was harmed by aerial spraying on adjacent land. 88 Wash. at 858-59. Obviously the spraying had to be done where it was, i.e., from a practical standpoint it was the only place to do it to benefit the adjacent landowner. But "[g]iven the nature of organic farming, the use of pesticides adjacent to such an area must be considered an activity conducted in an inappropriate place." *Id.* at 864.

Similarly here, practically speaking Hanford was likely the best site. But given the potential risk of I-131 exposure resulting in possible disease to those downwind of the facility, the placement of the chemical separation process at Hanford must be considered an activity conducted in an inappropriate place for the purposes of an abnormally dangerous activity evaluation. It would be anomalous for the Court to hold otherwise and have this factor weigh against finding an abnormally dangerous activity given the undisputed fact that downwinders did receive doses of I-131 from the Hanford facility.

(f) Extent to Which its Value to the Community Is Outweighed by its Dangerous Attributes. The Restatement § 520 provides guidance on the evaluation of this factor as follows:

> Even though the activity involves a serious risk of harm that cannot be eliminated with reasonable care and it is not a matter of common usage, its value to the community may be such that the danger will not be regarded as an abnormal one. This is true particularly where the community is largely devoted to the dangerous enterprise and its prosperity largely depends upon it.

Restatement, § 520, comment k, p.42.

The Restatement also notes that

> The utility of [the actor's] conduct may be such that he is socially justified in proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.

Id. at comment h, p. 39.

This factor requires the Court to do a risk benefit analysis, but as comment h indicates, policy considerations about who should bear the risk also are relevant.

The Plaintiffs do not dispute Hanford's contribution to the United States' victory in World War II. They point out, however, that the entire nation benefitted while only the people surrounding Hanford bore the health risks, that were not knowingly or voluntarily accepted by this community. Plaintiffs argue that "if injury to some was the necessary price for a benefit to the many, the just course is to be glad of the benefit while compensating the injured." Plaintiffs' Memo. filed 9/08/04 (Ct. Rec. 1564) at p. 11. Defendants agree that plutonium production was a socially justified activity. They argue that the risks were not great as the separation process "was conducted in a manner that ensured that any risks associated with the emission of I-131 were negligible." Defendants' Response filed 9/29/04 (Ct. Rec. 1576) at p. 17.

The fact related to this factor is: The Hanford Operation Played a Critical Role in Bringing World

War II to a Successful End in August, 1945. Δs' SOF 39.

The chemical separation process for plutonium production which resulted in the release into the air of I-131 presented a risk of serious illness to people living in the downwind areas. The risk could not be eliminated with reasonable care given the high war demand for the plutonium and the activity is not a matter of common usage. That said, Hanford's value to the national community was high. If only the downwind area had benefitted from the Defendants' activity, this factor might weigh against a finding of an abnormally dangerous activity. In this case, however, the benefit accrued to the entire nation but the risk and the potential harm was endured only by the people downwind of Hanford. Policy considerations support that this factor be weighed in favor of finding the Defendants' activities to be abnormally dangerous. The innocent people who can prove they suffered harm should be compensated by the entire nation who benefitted from the activity. This is consistent with the Congressional intent underlying the P-AA. In sum, the Court concludes that the six factors of Restatement § 520 weigh in favor of a finding that the Defendants were engaged in an abnormally dangerous activity which allows the imposition of strict liability under Washington law. The Court's inquiry does not end at this point however, as Defendants have raised two arguments why strict liability may not be imposed on them.

Public Duty. Defendants, assert that they may not be held strictly liable because they acted pursuant to a public duty. Defendants cite, *inter alia* , Restatement (Second) of Torts § 521 and *Lamb*

v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959 (W.D. Ky. 1993). Plaintiffs counter that Washington has never adopted § 521 and even if it had, the Defendants would not fit within the plain terms of the section because they are not public officers or employees or common carriers.

Restatement § 521 provides:

> The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

Restatement § 521, p. 46.

A justifiable inference may be drawn that Defendants were fulfilling a "public duty." It is not disputed that the plutonium production by Defendants was at the direct request of the government and was important, if not critical, to the nation's defense. Still, the fact that Defendants were engaged in a public duty does not necessarily mean that the public duty exception to strict liability would be applicable here.

On a Price-Anderson Act [P-AA] claim "the substantive rules for decision . . . shall be derived from the law of the State in which the nuclear incident involved occurs . . . ." 42 U.S.C. § 2014(hh). In this case, the substantive law of Washington is applied. Some states, such as Kentucky, have adopted § 521 of the Restatement and found public officers and common carriers to not be subject to strict liability. *See, e.g., Kentucky Utilities Co. v. Auto Crane Co.*, 674 S.W. 2d 15, 18 (Ky. Ct. App. 1983) (the transmission of electricity is a public

necessity and not subject to strict liability as abnormally dangerous activity citing § 521). Other states, such as Washington, have not adopted § 521.[5] In dealing with a common carrier of gasoline who caused a fatal accident from a spill, the Washington court held the common carrier strictly liable under § 520 of the Restatement. *Siegler v. Kuhlman*, 81 Wash. 2d 448 (1972). A California federal district court cited *Siegler* in holding a railroad strictly liable for an explosion caused by bombs being carried under contract with the *Navy*. *Chavez v. So. Pacific Transp. Co.*, 413 F. Supp. 1203, 1214 (E.D. Cal. 1976). The court explained that common carriers engaged in abnormally dangerous activities were held strictly liable for harm caused from the activity based upon the rationale that the carrier could distribute that loss to the public. *Id.* at 1214. "The harsh impact of inevitable disasters is softened by spreading the cost among a greater population and over a longer time period. A more efficient allocation of resources results." *Id.* The Washington court's failure to apply § 521 in the *Siegler* case, and the spreading of the loss rationale support Plaintiffs' argument that Washington has not adopted § 521 of the Restatement so it is not applicable to Defendants' on this Motion.

In addition, Plaintiffs argue persuasively that even if Washington had adopted § 521 of the Restatement, the section would not be applicable to the Defendants because they are not public officers

---

[5] Defendants do not cite, nor could the Court find, any Washington case that applied Restatement (Second) of Torts § 521.

or employees or a common carrier. Even though the Defendants may have been operating under contract with the government, that would not preclude them from being held strictly liable. *See Lobozzo v. Adam Eidemiller, Inc.*, 263 A.2d 432 (Pa. 1997) (highway construction contractor was strictly liable for damage to adjacent property caused by blasting even though the governmental entity's plans and specifications required the blasting). Defendants' citation to *Lamb* provides little strength to their argument that Defendants may not be held strictly liable under § 521. Defendants cite the case for an alternate holding and that holding was based on Kentucky law, a state which had adopted § 521 and the public duty exception to strict liability, not Washington law. *Lamb*, 835 F. Supp. at 971. The court made this alternate determination without addressing whether the contractor was a public officer or employee or common carrier. *Id.*

In the *Lobozzo* case, the court explained the rationale for excepting public officers or employees from strict liability. Such a person has a duty to conduct activities assigned by his or her government employer even if the activity was abnormally dangerous. The government may be immune to suit if the activity causes harm to the public but the public servant may not share the immunity. The court reasoned that the public servant should not be held liable when he is not in a position like that of an independent contractor who could balance the risks and contract with the government accordingly. *Lobozzo*, 263 A.2d at 434. Here, the Defendants were independent contractors who were undisputedly aware of the risks of the activity and

did contract accordingly. Πs' SOF 17, 23; Δs' SOF 3, 5. The Court concludes that the public duty exception to strict liability (Restatement § 521) is not applicable to the Defendants.

Preemption of State Standard Defendants also argue that the Washington strict liability standard is preempted by federal regulations. Defendants assert that all federal circuits that have addressed the issue have concluded that the P-AA preempts states from imposing non-federal duties in tort for alleged injuries arising from nuclear incidents and that federal, not state, law provides the liability standard for claims arising under the Act. Plaintiffs respond first that there were no federal regulations at the time of the Defendants' releases at issue in this case, only tolerance doses that the operators consulted for practical guidance. Second, Plaintiffs assert that the cases cited by the Defendants from other circuits were wrongly decided as explained by Judge Kane in *Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175 (D. Colo. 2003).

Defendants request that the Court infer from the facts presented that the tolerance doses established by scientists working with the Defendants were federal safety regulations governing releases from nuclear facilities at the time of the early emissions of I-131 from Hanford. These standards, the Defendants argue, should preempt Washington standards. It is undisputed that Met Lab scientists working with the Defendants established tolerance doses for human exposure. Δs' SOF 12. The Defendants suggested inference is not justifiable for two reasons. First, the tolerance doses were not emissions standards. Doses received by individual

Plaintiffs relate to the causation question, not to the Defendants' activity resulting in emissions. Second, the Atomic Energy Commission in a 1945 article noted that these doses had no legal status. Plaintiffs' Reply Exh. N, p. 18. The tolerance doses were practical guidelines not legally binding federal regulations. The Court concludes that no federally-established regulations existed in the early years of Hanford emissions of I-131. Thus no standards would exist to test the Plaintiffs' claims against if the Washington law of strict liability was preempted. Here, from a purely practical standpoint federal law does not preempt state strict liability standards.

From a legal standpoint the Court also concludes that even if the tolerance doses were construed as federal regulations they would not preempt the Washington standard of strict liability. Unfortunately, there is no Ninth Circuit authority on this issue. The most relevant Supreme Court authority is found in *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984). *Silkwood* addressed claims of the estate of a deceased lab analyst at a federally licensed nuclear facility brought under state tort law to recover for plutonium contamination to the analyst's person and property. The jury awarded, *inter alia*, punitive damages and the Supreme Court upheld the award. *Silkwood*, 464 U.S. at 258. Although this was not a P-AA claim, as the Supreme Court noted, it discussed the P-AA at length. *Id.* at 251-56. The court's conclusion is significantly probative on the issue before this Court.

> In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in

whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is a tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

We do not suggest that there could never be an instance in which the federal law would preempt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the

> federal law. We perceive no such conflict or frustration in the circumstances of this case.

Id. at 256.

The Defendants suggest that the *Silkwood* decision was wrongly decided. It appears unlikely that the Supreme Court is withdrawing from its holding that incidental regulatory effects are permissible and only direct state regulation of safety aspects of nuclear energy are preempted. The holding has been cited in several more recent Supreme Court cases, one allowing state workers' compensation awards to employees at a nuclear production facility, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988), and in another precluding preemption by the federal Energy Reorganization Act of state law claims for intentional infliction of emotional distress of a nuclear fuel production facility worker. *English v. GE Co.*, 496 U.S. 72, 85-86 (1990). Most recently the Supreme Court, in discussing its earlier *Silkwood* decision, noted the clear Congressional intent that supported the *Silkwood* decision to not preempt state remedies such as punitive damages. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351-52 (2001).

The *Silkwood* decision predated the 1988 Amendments Act to the P-AA. The Amendments Act expanded original and removal jurisdiction creating a federal cause of action for any action arising from a nuclear incident. 42 U.S.C. § 2210(n)(2). Congress also directed that the state law would provide the rules of decision "unless such law is inconsistent with provisions of such section [referring to 42 U.S.C. § 2210, the Price-Anderson Act]." 42 U.S.C.

§ 2014(hh). Two circuits, the Third and the Seventh, heavily relied upon by the Defendants, addressed the constitutionality of the Amendments Act and found that Congress had not exceeded its Article III authority. *In Re: TMI Litigation Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991); *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994). Had these cases found otherwise, the federal compensatory scheme would have been stricken. Instead, in *TMI* the court found that the P-AA removal provision was constitutional so that the personal injury claims related to the *TMI* incident were properly removed from state to federal court. 940 F.2d 832. The *O'Connor* case relied on *TMI* and similarly found a nuclear power plant worker's state claim for negligent exposure to radiation which caused injury properly removed to federal court. 13 F.3d 1090. Summary judgment was granted to the defendants in the O'Connor case because the worker could not show that federal safety standards regarding permissible radiation doses were exceeded. 13 F.3d at 1107.

Both *TMI* and *O'Connor* found the Amendments Act constitutional using a field preemption analysis, observing that the federal government occupied the whole field of nuclear safety and thus state law was preempted if it acted in any way regulated by the Act. *TMI*, 940 F.2d at 858; *O'Connor*, 13 F.3d at 1101. *O'Connor* in addition held that federal nuclear safety standards would establish the standard of care as opposed to state standards which were preempted. *O'Connor*, 13 F.3d at 1104. Plaintiffs assert that these cases were wrongly decided and cite Judge Kane's lengthy and scholarly order in

Cook v. Rockwell Int'l Corp. and *Dow Chemical Corp.*, 273 F. Supp. 2d 1175 (D. Colo. 2003). Judge Kane concluded that federal nuclear safety regulations did not preempt state standards of care in P-AA public liability actions. *Cook*, 273 F. Supp. 2d 1175. He did so only after a comprehensive review of federal preemption and the history of the P-AA including the Amendments Act. He recognized his conclusion was at odds with the authority of *TMI* and *O'Connor* but found that these cases were contrary to the Supreme Court rulings in *Silkwood*, the plain language of the Amendments Act, and the Congressional intent surrounding the P-AA. *Cook*, 273 F. Supp. 2d 1193-99.

In reviewing *TMI* and *O'Connor*, Judge Kane correctly observed that the use of field preemption was in violation of the Supreme Court direction in *Silkwood* that preemption in radiation injury claims should not be based on the fact that the federal government so completely occupied the field of safety that state remedies were foreclosed. *Cook*, 273 F. Supp. 2d at 1194. Judge Kane also correctly observed that both *TMI* and *O'Connor* violated the *Silkwood* binding determination of Congressional intent at least as to the pre-1988 amendments. *Id.* at 1194. In addition, the *O'Connor* court justified federal preemption of state standards by asserting that federal nuclear safety standards are part of the P-AA statutory scheme. *O'Connor*, 13 F.3d at 1195. As Judge Kane points out, that contradicts the plain language of § 2014(hh) which provides that state law provides the rule of decision unless state law is inconsistent with the Act. *Id.* The Act, § 2210, does not incorporate any federal safety regulations.

Further, the legislative history of the 1988 Amendments Act does not support any Congressional intent to incorporate federal safety regulations and to preempt state law. *Id.*

In *Silkwood*, the Supreme Court determined that an award of punitive damages did not create an irreconcilable conflict between federal and state standards and did not frustrate the objectives of federal law. *Silkwood*, 464 U.S. at 257-58. The Washington strict liability law would similarly not create an irreconcilable conflict between federal and state standards or frustrate the objectives of federal law.

Based upon the P-AA compensatory purpose and the plain language of § 2014(hh) of the Amendments Act that state law applies, the Court concludes that Judge Kane's analysis of preemption is correct. The P-AA does not require that federal safety regulations establish the standard of care and preempt state tort remedies. The progeny of *TMI* and *O'Connor* repeat the questionable analysis of these cases. *Nieman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997); *Roberts v. Florida Power & Light Co.*, 146 F.3d 105 (11th Cir. 1998) (*per curiam*). Other cases, as Judge Kane points out, just accept the questionable preemption analysis and cite the above cases. *Cook*, 273 F. Supp. 2d at 1199, referencing *Good v. Fluor Daniel Corp.*, 222 F. Supp. 2d 1236, 1247 (E.D. Wash. 2002); *see also McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457, 465-66 (S.D. Cal.,1996; *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 218 (D. Me.,1996).

II. CONCLUSION

Plaintiffs brought a motion for partial summary judgment on the issue of whether Defendants were engaged in an abnormally dangerous activity and thus strictly liable. Although Defendants were fulfilling a public duty, § 521 of the Restatement does not operate to preclude an application of strict liability. In addition, the P-AA requires that the substantive law of the State be applied, and this law is not preempted by any federal law. In Washington strict liability is applied if Defendants are engaged in an abnormally dangerous activity. The Restatement factors of § 520 weigh in favor of a finding that the Defendants' were engaged in an abnormally dangerous activity.

Even though Defendants likely made their best efforts to minimize risk the war effort required that safety take a second seat to plutonium production. Defendants argue they should not be held strictly liable if they did nothing wrong. The Court's determination is not that Defendants did anything wrong, only that they were engaged in an activity that was abnormally dangerous and that in such cases Defendants can spread the risk more equitably allowing those who sustained harm to recover without having to prove that Defendants were negligent. The remaining issue for trial is whether Defendants' activities caused the Plaintiffs' alleged damages. Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment – Abnormally Dangerous Activity, filed September 9, 2004, **Ct. Rec. 1564**, is **GRANTED**.

The District Court Executive is directed to file this Order and provide copies to Liaison Counsel; Mediator Gary Bloom; **AND TO** pro se Plaintiffs Noreen L. Wynne, Carmela M. Destito-Buttice (for late John P. Destito, Jr.), and Marylin F. Mlnarik.

DATED this 3rd day of November, 2004.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE HANFORD NUCLEAR
RESERVATION LITIGATION

ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER ORDER RE: ABNORMALLY DANGEROUS ACTIVITY

No. CY-91-3015-WFN

This Order Relates to: All Cases

Before the Court for hearing without oral argument is the Defendants' Motion to Reconsider Order Re: Plaintiffs' Motion for Summary Judgment—Abnormally Dangerous Activity, filed January 14, 2005 (Ct. Rec. 1697). Plaintiffs' Response was filed February 11, 2005 (Ct. Rec. 1744). Defendants' Reply was filed March 4, 2005 (Ct. Rec. 1784).

The Court has reviewed the file, the Motion, all briefing and materials presented on the Motion and is fully informed. For the reasons stated below, the Defendants' Motion to Reconsider is denied.

I. BACKGROUND

On November 3, 2004, this Court's Order granting Plaintiffs' Motion for Summary Judgment—Abnormally Dangerous Activity was filed (Ct. Rec. 1603). The Court determined that the Defendants were engaged in abnormally dangerous activity and that strict liability would apply. The Court made its determination after a consideration

of the factors set forth in § 520 of the Restatement (Second) of Torts (1997) [Restatement]. In addition, the Court concluded that although the Defendants were fulfilling a public duty, § 521 of the Restatement did not preclude the application of strict liability. Finally, the Court determined that the Price-Anderson Act [P-AA] required the substantive law of the state to be applied and that state law was not preempted by any federal law. The Court noted in its conclusion that it had not determined that the Defendants had done anything wrong, but simply that they had engaged in an abnormally dangerous activity and could spread the risk of the abnormally dangerous activity more equitably.

II. DISCUSSION

The Defendants allege that the Court improperly resolved disputed issues of material fact on the Plaintiffs' Motion, made clearly erroneous findings of fact, and should reconsider its conclusion that the Defendants were engaged in an abnormally dangerous activity. The major grounds for granting a motion to reconsider are: (1) intervening change of controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *School Dist. No. 1J, Multnomah Co., Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). There has been no intervening change of controlling law nor is new evidence available. The Defendants assert that reconsideration must occur to correct clear error and prevent manifest injustice.

Summary Judgment Standard. The Defendants assert that Court committed clear

procedural error by resolving several disputed questions of fact on Plaintiffs' Motion. The Defendants are correct that on a motion for summary judgment the Federal Rules of Civil Procedure govern even if the Court is applying substantive state law. *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965). Rule 56 governs a summary judgment motion and this Court correctly set forth the summary judgment standard in its Order. Order Re: Plaintiffs' Motion for Summary Judgment—Abnormally Dangerous Activity [Order], filed 11/03/04, Ct. Rec. 1603, pp 2-3. Defendants challenge how the Court chose to apply this standard when confronted with the question of law of whether Defendants were engaged in an abnormally dangerous activity.

Defendants assert that the Court may not weigh the facts where a dispute exists, while Plaintiffs argue that the Court may do so to resolve the legal question presented. The Court contributed to the conflict by stating that although it believed the material facts were generally not in dispute, that the Court was permitted to weigh disputed facts. Order, p. 3. The Court withdraws this later comment as in retrospect it is not necessary to reach the question of whether the Court can weigh evidence.[1] What the Court did was review the file and the materials

---

[1] The Court also must note that it was incorrect in stating that the parties agreed that "the facts upon which the Court must make its legal determination are not facts that a jury must decide." Order, p.2. The Defendants assert that the factual determinations are matters for the jury.

presented on the Plaintiffs' Motion to determine if sufficient undisputed material facts existed upon which to answer the question of law of whether Defendants were engaged in an abnormally dangerous activity.

It is the Court's opinion that its ruling does not depend on the resolution of disputed facts. There were sufficient undisputed material facts upon which to base a legal determination. Moreover, summary judgment is not precluded because the Defendants dispute the ultimate conclusions the Court has drawn from these undisputed material facts. *See Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) ("No material historical facts are at issue in this case. The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper & Row*, these judgments are legal in nature, we can make them without usurping the function of the jury."); *Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409, 415-16 (5th Cir. 1987) (Court drew inferences that storage of ammonia was not an ultra-hazardous activity based on undisputed facts.)

The Court recognizes that there are many disputed specific questions of fact regarding causation that remain for trial. For example, it is disputed what the actual level of exposure of most bellwether Plaintiffs was, but it is undisputed that there was some exposure. It is also disputed whether the I-131 exposure caused the Plaintiffs' alleged thyroid diseases. These questions of fact and other areas of disagreement highlighted by Defendants were determined to not be material to the inquiry of whether the Defendants were engaged

in an abnormally dangerous activity. That legal determination can be made based upon more general facts related to the Defendants' activity. Accordingly, the Court need not reach the issue of whether the Court or the jury would be required to find predicate facts at trial if summary judgment was precluded on this issue. Although Defendants suggest that special interrogatories be presented to the jury on disputed predicate facts, Defendants also cite a case in which the court was determined to be the entity that would resolve any conflict in testimony related to the legal question of whether the activity was ultra-hazardous. *Edwards v. Post Transportation Co.*, 228 Cal.App.3d 980, 984 (1991).

Abnormally Dangerous Activity. Defendants challenge the Court's Order asserting that even if the Court could resolve disputed issues of fact, that the Court made six wrong findings and did not construe all facts and draw all justifiable inferences in their favor. The Court correctly set forth the applicable Washington State law regarding the six factors to be weighed by the Court in determining whether Defendants' activity constituted an abnormally dangerous activity. Order, pp. 3-6. Defendants specifically challenge the facts underlying the Court's statement related only to the first factor - whether there was a high degree of risk of some harm to the person, land, or chattels of others. It bears repeating that "[t]he essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it, even though it is carried on with all

reasonable care." *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 862 (1977), quoting Restatement (Second) of Torts [Restatement] § 520, comment f. (1977). Although this Court did not specifically say so, it was engaged in predicting what the Washington Supreme Court would decide regarding whether Defendants' chemical separation and release of I-131 into the atmosphere was an abnormally dangerous activity. *See Sprankle*, 824 F.2d at 415 ("It is our task, therefore, to predict whether the Mississippi Supreme Court would decide that Bower's storage of ammonia at the Reichhold plant constitutes an ultrahazardous activity for purposes of imposing strict liability.")

The Court listed seven statements in its Order that it believed were undisputed and related to the first factor - the existence of high degree of risk of some harm to the person, land, or chattels of others. Defendants first challenge the Court's general statement that the scientific community knew of the I-131 and thyroid connection and cancer risk of radiation. Defendants' challenge misses the mark however because they inaccurately assert that the Court found that "It was Known In the Early 1940's . . . I-131 Could Cause Thyroid Cancer and Hypothyroidism." Defendants' Brief filed 1/14/05, Ct. Rec. 1698, p. 8. This is not what the Court stated. The Court agrees with Defendants that the causal connection between the radiation exposure and specific diseases such as thyroid cancer and hypothyroidism is disputed. However, as noted in the Order, this is not material to the determination of abnormally dangerous activity. Order, p. 7.

Second, Defendants challenge the Court's statement that the Defendants attempted to control I-131 emissions with variable success. Defendants assert that two serial statements of the Court left the impression that Hanford emissions resulted in exposures to humans in excess of the safety level established of one rad per day. Although both the Court's statements are accurate reflections of the documents, the Defendants' observation is well taken. It is not disputed that scientists established a safety level of one rad per day for humans. Also, in 1948 it was recommended that cooling times be increased because of results of off-area contamination of vegetation which showed "[s]cattered readings two to two and a half times the estimated tolerable limit of 0.2 μc I-131/kg. are found at air-___ [illegible] distances of the order of 50 miles from the stacks." Defendants' Exhibit 7, Ct. Rec. 1575, p. 1. The hazard being discussed was to domestic animals feeding exclusively on vegetation and the paper stated "[t]here is no foreseeable hazard to man." *Id.* Therefore, readings above tolerable limits were found in regards to deposition on vegetation not above one rad exposure to humans.

Defendants then assert two additional serial statements of the Court create the implication that Defendants routinely violated recommended cooling times. Again, both statements are accurate reflections of the documents: in January 1944, Met Lab recommended cooling times of 54-62 days and some cooling times in 1944 and 1945 ranged from the 32.7 to 50 days. Defendants correctly note that in December, 1944 the recommended cooling times were reduced to 5-37 days depending on the KW

power. Defendants' Exhibit 15.[2] However, defense expert Dr. Herken noted that Dr. Parker had recommended cooling times be increased from 35 to 60 days in December, 1945, then to 90 days in March, 1947, and to 125 days in April, 1948. Defendants' Brief, filed 1/14/05, Ct. Rec. 1698, Exhibit A [Herken's Report], pp. 16, 18. Further, Dr. Herken recognized that "[t]ruly effective filters would not be in operation at Hanford until late 1950 or early 1951. Even then, the increased power levels at which the reactors were operated caused occasional fuel failures and other accidents leading to unintentional radiation releases." *Id.* at 21. Dr. Herken also reports on the intentional release of radiation, the Green Run, on December 2, 1949, when the scrubbers were disabled and fuel cooled for only 16-20 days was dissolved. *Id.* at 26. Dr. Herken finally commented that "[a]lthough fuel failures and other reactor accidents would continue at [Hanford] well beyond 1958, the contamination issue that had been dominate during the Second World War and the early Cold War was, by this date, largely a thing of the past." *Id.* at 31.

Even given the Defendants' appropriate clarifications, the Courts' statement that Defendants attempted to control I-131 emissions with variable success, is still a correct statement. Defendants are in error when they assert that these clarifications

---

[2] Although this Exhibit was cited by Defendants' Statement of Facts #9 and #33 the Court notes that the cooling time recommendations of 5-37 days were not included in Defendants' Statement of Facts.

would alter the Court's conclusion that Defendants "caused significant early releases of I-31." That conclusion gained additional support from the first undisputed statement made by the Court that Hanford created I-131 and released it into the air, noting that most of the releases occurred between December, 1944 and December, 1947, and that some 740,000 curies were released between 1944 and 1992. Order, pp. 7-8. Dr. Herken's Report also supports the fact that Defendants were attempting to minimize what they considered real health and safety concerns even if they thought that their actions carried no risk to humans at that time. Herken's Report.

Third, Defendants challenge the Court's statement that although Defendants said there was no risk with the emissions that they acknowledged the need for more information. While it is true that statement regarding additional information was made by the Atomic Energy Commission [AEC], a fair reading of this statement and other evidence supports the Court's inference. The AEC said

> [i]nspite of the reassuring results obtained from environmental monitoring, the Commission needs to know what the consequences would be if radioiodine, for example, were to fall steadily over a period of time within the range of grazing animals. It is possible that no harm would come from many times the amount of contamination now allowed. But this possibility cannot be assessed without a great deal more knowledge.

> For this reason, the Hanford zoology group has undertaken a number of studies, the most ambitious of which is a continuing experiment with sheep, the common grazing animal of the region.
>
> Defendants' Exhibit 25, p. 115.

The defense expert report of Dr. Herken also sheds light on the issue of whether Defendants acknowledged a need for more information about risk. Dr. Herken throughout his historical report indicates, as this Court did, that Defendants did not believe there was a risk for humans associated with Defendants' activity. But he further reports that "[s]afety and health were early and significant concerns . . . ." Herken's Report, p. 2. By late summer of 1944 he states that I-131 was recognized as a potential health hazard. *Id.* at p. 10. The threat was thought to exist for livestock ingesting vegetation near Hanford, but by the early to mid1950s the milk pathway and its health hazards for human became known. *Id.* A prevalent theme of Dr. Herken's Report was that production requirements for WWII and the Cold War almost invariable trumped protection or safety concerns. Those concerns were not only for Hanford workers but for those "outside the fence." *Id.* at 3; *see also* p. 18 (concern expressed in April, 1948 about "preventing release of noxious material outside those locations.")

It is fair to infer that Defendants recognized that more information regarding risk was needed. First, Dr. Parker presented a strong and conservative voice advocating emissions that were lower than

permissible limits because of "incompletely evaluated hazards." *Id.* at 10. Second, in April, 1946, Dr. Parker wanted to do more extensive studies on vegetation in the area surrounding Hanford but he was not allowed to collect data because of the veil of secrecy surrounding the project. *Id.* at 24. The military collected some data which Parker said was of dubious worth. *Id.* In these early years of operation, specifically September, 1947, the AEC also noted that there was little information of the "long-range effects of radiation particularly from the standpoint of the environment [including] air, by burial, and underground." *Id.* at 17.

Fourth, Defendants challenge the Court's statement that the scientific community was aware and the Defendants likely knew of the milk route. The Court correctly noted that as early as 1925 scientists knew that iodine in the diet of milk cows was transferred to their milk. Defendants are correct that Plaintiffs' expert Poston observed that this information would not have been common knowledge of scientists at Met Lab however. Plaintiffs' Statement of Facts, filed 9/8/04, Ct. Rec. 1567, [Plaintiffs' SOF], Exhibit L at 25. Defendants also assert that the Court misconstrued Dr. Parker's letter which acknowledged the milk pathway, dated April 4, 1955, as saying that this risk was known since the first years of Hanford operation. Plaintiffs' SOF, Exhibit P. The statement that the Defendants likely knew of the milk route risk is true. Based on the somewhat ambiguous letter, however, the inference drawn in Defendants' favor is that their knowledge in this regard was at least by 1955.

Finally, Defendants challenge the Court's statement that Defendants generally knew of physiological risks associated with their activity. The Court relied upon documents showing that both DuPont and General Electric sought releases from liability due to the physiological hazards associated with the projects. The Defendants accuse the Court of relying upon a "few abstract statements in documents" about unspecified risks and "side-stepping the intense debate between the parties on these critical issues . . . ." Defendants' Brief, Ct. Rec. 1698, p. 17. The Court also stated, and the Defendants do not specifically challenge, that Defendants knew of the I-131 and thyroid connection. The Order stated in this regard:

> Specifically, Met Lab scientists working with Hanford noted in March of 1943 that releases of I-131 could cause damage by the concentration of the iodine in the thyroid. πs' SOF 18, 19; *see also* πs' SOF 20, 22. In November 1943, MetLab recognized that this could result in the possible destruction of the thyroid. πs' SOF 21. In 1943, Met Lab had a fear that the iodine would be released and noted that they could protect the thyroid gland from the I-131 by administering potassium iodine pills. πs' R-SOF 9-11. In March, 1944, Met Lab planned medical research projects to look for cancer and other long-term effects of radiation. πs' R-SOF 4.

Order p. 9. These undisputed facts are not "abstract" and support the Court's statements.

Defendants' challenge also raises the issue of whether this first factor in the analysis of abnormally dangerous activity requires Defendants' knowledge of the risks. In support of this requirement Defendants cited the tentative draft of the Restatement (Third). Transcript of Hearing on Motion for Summary Judgment, filed 11/19/04, Ct. Rec. 1606 [Transcript] p. 28. Defendants also noted that the tentative draft of the Third Restatement has removed the six factor analysis in favor of an analysis of "all relevant . . . areas". Transcript, p. 42. It is beyond dispute that Washington State adopted the Second Restatement and the six factor analysis. *Langen*, 88 Wash. 2d at 860. Further, one of Defendants' own case citations questions whether knowledge of risk is necessary. *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 807 (D.N.J., 1989) (The court stated: "I note in passing that I take issue with Alcoa's characterization as to what certain of the Restatement factors require. First, I am not as certain as Alcoa appears to be that a defendant's knowledge of the risk is a necessary finding under Restatement § 520."). Under Washington case law it does not appear that knowledge of the risk is required for an activity to be found abnormally dangerous. Certainly the very specific knowledge that humans were at risk of developing thyroid disease through the milk pathway from the Defendants' emissions of I-131 is not necessary. However, even if general knowledge is required, there is sufficient undisputed evidence upon which to infer that the Defendants knew the release of emissions presented risks. Practically speaking, it is

undisputed that the facility was sited in as remote an area as possible due to safety and security concerns,[3] 200 feet stacks were built to exhaust the emissions with air injected to dilute the gases,[4] weather conditions were monitored to determine when emissions should occur,[5] filters and scrubbers were developed to remove portions of the emissions, and testing for surrounding contamination occurred. *See* Defendants' Brief, filed 1/14/05, Ct. Rec. 1698, Exhibit B, Report of Defense Expert, Ian Hamilton, [Hamilton Report] pp. 1-3. None of these actions would have been necessary if the emissions from the chemical separation plant activity were thought to be innocuous. The fact that Defendants believed their efforts were sufficient to foreclose any risk to humans, which the Court accepts as an inference in Defendants' favor, does not preclude the Court from determining that factor one of the abnormally dangerous activity analysis is satisfied. Defendants' activity of chemical separation and emissions of I-131 created a high degree of risk of some harm to the person, land, or chattels of others.

Defendants do not specifically challenge the facts underlying the Court's statements on the other five factors of the abnormally dangerous activity analysis: that the likelihood of harm will be great; there was an inability to eliminate risk by the

---

[3] Plaintiffs Statement of Facts, filed 9/08/04, Ct. Rec. 1567, Exhibit A, p. 1.11-1.12.

[4] Transcript, Mr. Squires, p. 47.

[5] Id.

exercise of reasonable care; that the activity is not one of common usage; that it was an inappropriate activity for the place; and that the value to the immediate community did not outweigh the activities' dangerous attributes. Defendants do assert that there are disputes as to what actual steps were taken to protect against harm but the Court drew the inference in Defendants' favor that they took protective steps but due to the war effort they could not eliminate all risk. Defendants also assert that disputes exist regarding whether chemical separation processes were common processes. Even if true, the release of I-131 into the air is not a common activity.

Preemption of State Standard. The Court determined that federal regulations did not preempt state standards for two reasons. Defendants argue that the first reason was improper as the Court concluded that there were no federal standards against which to test Plaintiffs' claims. Even assuming Defendants are correct, Defendants do not challenge the second reason and ignore that the Court concluded on legal grounds that even if the tolerance doses were construed as federal regulations, they would not preempt the Washington standard of strict liability. Order, pp. 23-27.

III. CONCLUSION

The Court is of the firm opinion that its ultimate conclusion on the issue of abnormally dangerous activity is correct. Put simply, the Defendants began extracting plutonium for uranium at the Hanford facility in 1944. During the chemical extraction process 1-131 was created and released into the

atmosphere. I-131 is capable of causing human harm to exposed persons, particularly to the thyroid gland. It follows that the Defendants were engaged in an abnormally dangerous activity. The Court need not reconsider its ruling to correct clear error or to prevent manifest injustice. Accordingly,

IT IS ORDERED that Defendants' Motion to Reconsider Order Re: Plaintiffs' Motion for Summary Judgment—Abnormally Dangerous Activity, filed January 14, 2005, **Ct. Rec. 1697**, is **DENIED**.

The District Court Executive is directed to file this Order and provide copies to Liaison Counsel; Mediator Gary Bloom; Plaintiff Kerry L. Todd **AND TO** pro se Plaintiffs Noreen L. Wynne, Carmela M. Destito-Buttice (for late John P. Destito, Jr.) and Marylin F. Mlnarik.

DATED this 15th day of March, 2005.

/s/
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE

Filed in the U.S.
Dist. Court Eastern
Dist. of Washington
July 22, 2004
James R. Larsen,
Clerk Deputy
Spokane

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE HANFORD NUCLEAR RESERVATION LITIGATION

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT STATUTE OF LIMITATIONS

No. CY-91-3015-WFN

This Order relates to: All Cases

At the eighth status conference on July 15, 2004, The Court reserved ruling on Defendants' Motion for Summary Judgment—Statute of Limitations, filed February 20, 2004 (Ct. Rec. 1433). Argument was presented by William Squires for the Defendants and Louise Roselle and Peter Nordberg for the Plaintiffs.[1]

The Court has reviewed the file, all materials submitted on the Motion, and the *Ball v. Union Carbide Corp.*, ___ F.3d ___ 2004 WL 1573172 (6th Cir. 7/15/04) decision presented at the hearing by

---

[1] *See* Eighth Status Conference Order: July 15, 2004, for listing of additional counsel present at the hearing.

Defendants; considered the oral arguments of counsel, and is fully informed. For the reasons stated below, the Motion is denied.

I. POSITIONS OF PARTIES

Defendants assert that five years before Plaintiffs filed suit on August 6, 1990,[2] there was massive publicity, extensive public disclosure of Department of Energy [DOE] documents, and government investigations that put the Plaintiffs on notice that Hanford 1-131 releases caused their alleged thyroid conditions. Defendants identify February 27, 1986, the date of the DOE's disclosure of 18,920 pages, as the date the Plaintiffs had knowledge regarding causation. Defendants assert that Plaintiffs whose diagnosis occurred before August 6, 1987 (three years before filing) did not assert timely claims.

The Plaintiffs argue that the DOE withheld information on Hanford emissions from 1944 until February 27, 1986. After the large DOE document disclosure tremendous efforts were needed to determine if the reported emissions had injured off-site residents. There was great uncertainty with many officials, including DOE, stating there was no evidence of harm. The media reported on many investigations and repeatedly stated that studies were needed to determine if harm occurred. Variables that would affect radiation dosage included wind, agricultural areas, type of products, and dietary habits of residents. *See* Defendants

---

[2] The *Evanson* class action was filed August 6, 1990 (CY-90-3067).

Media Appendix, THE OREGONIAN, Sept. 12, 1986.[3] As of August 6, 1987 (three years before filing), a Plaintiff would have concluded that uncertainty was great and the ongoing Hanford Environmental Dose Reconstruction Project [HEDR] and Hanford Thyroid Disease Study [HTDS] might resolve the question of harm. Plaintiffs assert that their cause of action accrued July 11, 1990, when the technical oversight panel for HEDR first stated that Hanford releases were significant enough to cause serious risk of illness. The lawsuit was timely filed less than one month later on August 6, 1990.

II. SUMMARY JUDGMENT STANDARD

The Defendants have moved for summary judgment. A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law by "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the moving party bears the burden of truth at trial, as the Defendants do here on the affirmative defense,[4]

---

[3] Hereinafter citations to the Defendants' two volume Media Appendix will be to the media source and date of publication.

[4] Washington law provides that the statute of limitations is an affirmative defense and it must be proved by the party asserting it. *Western Recreational Vehicles, Inc. v. Swift*

they "must come forward with evidence which would entitle [them] to a directed verdict if the evidence went uncontroverted at trial." *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992) (internal quotations omitted). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The court must construe all facts in favor of the non-moving party and all justifiable inferences are also to be drawn in his/her favor. *Anderson*, 477 U.S. at 255.

Once the Defendants have produced the required evidence, the burden shifts to the Plaintiffs. *Houghton*, 965 F.2d at 1537. The Plaintiffs must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (genuine issues are not raised by mere conclusory allegations). The non-moving party may do this by use of affidavits (including his own), depositions, answers to interrogatories and admissions. *Celotex*, 477 U.S. at 323-24. There is no issue for trial "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249.

III. ACCRUAL OF CAUSE OF ACTION

Plaintiffs' claims arise under the Price-Anderson Act [P-AA] which directs the Court to look to state

---

Adhesives, Inc., 23 F.3d 1547, 1553 (9th Cir. 1994); *Wagg v. Estate of Dunham*, 146 Wash. 2d 63, 66 (2002).

law for the substantive rules of decision unless the law is inconsistent with § 2210. 42 U.S.C. § 2014(hh). The P-AA does not have its own statute of limitations. A three year statute of limitations under Washington law applies to personal injury claims. WASH. REV. CODE § 4.16.080 (2). Here, the law of the case requires that Washington law not only provide the limitations period, but also the accrual principles that determine when the period began to run. *In Re: Hanford Nuclear Reservation Litigation*, 780 F. Supp. 1551, 1570-71, 1573-74 (E.D. Wash. 1991). Although the Ninth Circuit has declined to decide whether federal accrual principles or state accrual principles apply to P-AA claims, *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1149 n.4 (9th Cir. 2002), the Sixth Circuit has determined that state accrual principles apply to P-AA claims. *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997).

In an ordinary personal injury action, the general rule is that a cause of action accrues when the act or omission occurs. *Estates of Hibbard*, 118 Wash. 2d 737, 744 (1992). In Washington, however, the discovery rule is applied to claims where a plaintiff could not reasonably have known of the cause of the injury, e.g., when there has been professional malpractice or concealment of information by the defendant. *Id.* at 749-50. "The very basis of the discovery rule is that there is doubt as to when the statute begins to run." *North Coast Air v. Grumman Corp.*, 111 Wash. 2d 315, 328 (1988). The common-law discovery rule applies to all Washington "statutes of limitation, in the absence of legislation limiting the application of the rule. *Funkhouser v.*

Wilson, 89 Wash. App. 644, 666 (1998) , *aff'd in part and remanded C.J.C. v. Corp. of Catholic Bishop*, 138 Wash. 2d 699, 729 (1999).

> Here, the parties concur that under Washington law a cause of action accrues when a claimant knows, or in the exercise of due diligence should have known, all the essential elements of the cause of action, specifically duty, breach, causation and damages.

Estates of Hibbard, 118 Wash. 2d at 752. The purpose of the discovery rule is "to give the plaintiff a fair chance to ascertain the harm and its cause." *Grumman*, 111 Wash. 2d at 328. The defendant is protected from defending against stale claims by the requirement that plaintiff exercise due diligence in discovering the harm and its cause. *Id.*

Although Washington law governs, both parties cite federal law and the discussion of the federal discovery rule which is the same as the Washington discovery rule. In a toxic exposure case, the Ninth Circuit set out a two-part analysis to determine whether a plaintiff should have known of their claim:

> [f]irst, we consider whether a reasonable person in Plaintiffs' situation would have been expected to inquire about the cause of his or her injury. Second, if the plaintiff was on inquiry notice, we must next determine whether an inquiry would have disclosed the nature and cause of plaintiff's injury so as to put him on notice of his claim. The plaintiff

> will be charge with knowledge of facts that he would have discovered through inquiry.

O'Connor v. Boeing North American, Inc., 311 F.3d 1139, 1150 (9th Cir. 2002) (citations, quotations and brackets omitted).

Duty to Inquire. Defendants identify three factors which they maintain establish the Plaintiffs' duty to inquire including: Plaintiffs' diagnosis of illness; the publicity regarding Hanford emissions; and the fact that other suits were timely filed.

A. Diagnosis of Illness. Under Washington law simply learning of an injury is not sufficient to place a duty on a plaintiff to inquire. *Grumman*, 111 Wash. 2d at 319 (an action on a product defect did not accrue with knowledge of an airplane crash) ; *Lo v. Honda Motor Co.*, 73 Wash. App. 448, 460 (Div. I, 1994) (knowledge of birth asphyxia did not put plaintiff on inquiry notice in action for medical malpractice). A diagnosis of thyroid cancer would not necessarily place a duty on a plaintiff to inquire further because there are many causes of cancer so such a diagnosis does not excite investigation for cause. *See O'Connor*, 311 F.3d at 1150.

Here, Defendants argue that the Plaintiffs have represented in litigation that any radiation is harmful and radiation is the only known cause of thyroid cancer. Under these facts Defendants assert a Plaintiff's diagnosis placed upon him/her a duty to inquire or even gave the person knowledge regarding Hanford's causation of the person's injury. Defendants have presented no facts however, to support that at the time any Plaintiff was diagnosed, he/she knew either that any radiation was harmful

or that radiation is the only known cause of thyroid cancer. What Plaintiffs' experts now say is immaterial to what the Plaintiff knew at the time of the diagnosis. Moreover, publicity Defendants cite did not report that radiation was the only cause of thyroid cancer, only that it was a cause of thyroid cancer. Even if the Plaintiffs had known that radiation is the only cause of thyroid cancer, the media reported that radiation exposure came from many sources, not just Hanford emissions. *See* SEATTLE P-I, 5/14/86 (medical x-rays and flying are also sources of radiation). It is thus disputed whether the diagnosis of thyroid cancer alone would have put the Plaintiffs on notice and given them a duty to inquire.

B. Publicity Re: Hanford Emissions. There is no dispute that beginning with Karen Dorn-Steele's *Spokesman-Review* article of July 28, 1985 through August 6, 1990 when the *Evanson* case was filed, there was extensive publicity regarding Hanford emissions in Washington state, in Oregon and some sporadic national coverage, as Hanford was being considered as a national nuclear waste site. Persistent themes ran through the media accounts. One theme was that there was a suspicion that Hanford emissions had caused diseases among downwinders. Another theme was that the Hanford emissions, which were large compared to Three Mile Island [TMI] and Chernobyl, presented no health risk even though I-131 was emitted by Hanford and was known to cause thyroid cancer. This later theme was repeated: by DOE because it found no increased risk in Hanford workers; by the state radiation specialists in Washington and Oregon; by

Congressman Foley; by the Washington State epidemiologist; by the Benton and Franklin County M.D. Health Director; and by a Walla Walla physician. Of note was the fact that almost every article which included the suspicion that the emissions did cause disease, also made reference to the disclaimers and to a third persistent theme that health studies were needed and investigations would be done.

Defendants assert based on *Allen v. State*, 118 Wash. 2d 753 (1992) and *Ball v. Union Carbide Corp.*, ___ F.3d ___, 2004 WL 1573172 (6th Cir. 7/15/04) that the publicity was sufficient to create a duty to inquire. Plaintiffs' correctly noted at oral argument that *Allen* stood for a proposition not applicable here, that once a potential plaintiff begins an inquiry, the person cannot cease. *Ball* was also shown by Plaintiffs at oral argument to actually lend support to the Plaintiffs. In *Ball* the court observed that where there was widespread publicity the plaintiffs, living close to the Oak Ridge nuclear site, should have been aware of their potential personal injury claims at the latest when official preliminary reports became available. *Ball*, 2004 WL 1573172, *6. Here, the Plaintiffs filed suit one month after the first preliminary report of HEDR. Under the reasoning of the *Ball* court, the Hanford filing should have been timely. A reasonable person would not necessarily have been expected to inquire based upon these media reports.

C. Other Timely Filed Suits. When media attention is given to other similarly situated plaintiffs filing lawsuits, federal courts have held that causes of action accrue at that time. In *Hughes*

v. Vanderbilt Univ., 215 F.3d 543, 548 (6th Cir. 2000), a woman who resided in Nashville, Tennessee when press and t.v. coverage was given to lawsuits against the defendant was charged with constructive knowledge of her claim and that her suit filed $4^{1/2}$ years later was untimely. In *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975), a stockholders' fraud action was deemed untimely because the stockholders should have discovered evidence of fraud earlier when the Stock Exchange and the SEC filed actions against the company that were publicized and when another lawsuit was filed against the company.

Here, the Defendants assert that two lawsuits were filed that should have put other plaintiffs on notice as well as the fact that the plaintiffs' bar advertised that the statute of limitations would expire February 27, 1988, two years after the release of the DOE documents. However, the determination of the Plaintiffs' bar regarding the statute of limitation was within three years of Plaintiffs' suit being filed and is therefore immaterial.

The first lawsuit was filed February 19, 1988, in Oregon federal court by Oregon counsel on behalf of Chuck Seaman, personal representative for Frieda Seaman against DuPont and General Electric. CY-91-3080. Frieda Seaman died of radiation poisoning in 1986. After the Federal Tort Claims Act claim was dismissed against the United States by Judge Panner, the *Seaman* case was transferred to the Eastern District of Washington on December 2, 1991. This Court could not locate any media reports regarding the *Seaman* case that would have put the Plaintiffs on inquiry notice.

The second Hanford related case was filed July 31, 1986, by ten Colville Tribal members in the Eastern District of Washington against the United States, DuPont and GE. SPOKESMAN-REVIEW article, 8/03/86. Less than a year later, on June 25, 1987, the *Spokesman-Review* reported that a stipulated dismissal with a right to refile would be entered in the Colville case. Joint Stipulation filed 7/13/87, C-86-601-JLQ, Ct. Rec. 13. The Court takes judicial notice of the Joint Stipulation which includes the comment "the parties anticipate that the study [dose reconstruction] may provide more definitive data on health effects." *Id.* Thus the case that received publicity did not proceed in part because definitive data on health effects was not yet available. A reasonable person might not have been expected to inquire about the cause of his/her disease based upon this aborted litigation.

A review of the above three factors identified by the Defendants lead this Court to conclude that material questions of fact exist as to whether these factors were sufficient alone or in combination to put Plaintiff on notice that he/she had a duty to inquire as to whether Hanford emissions had caused his/her injury. This conclusion is supported by Washington cases which have held that a plaintiff's duty of due diligence normally raises a factual question that will preclude summary judgment unless reasonable minds can reach but one conclusion. *Estates of Hibbard,* 118 Wash. 2d at 760; *Green* v. *A.P.C.*, 136 Wash. 2d 87, 100 (1998). Reasonable minds could reach more than one conclusion on this issue.

What Would an Inquiry Reveal? Even if there was no material question of fact as to a duty to

inquire, to obtain summary judgment the Defendants would still have to show that no material question of fact existed on what an inquiry by Plaintiffs would have revealed. It is undisputed that Washington law provides that a cause of action will accrue when the facts supporting the claim should have been discovered, not when they actually were discovered. *Allen v. State*, 118 Wash. 2d 753, 758 (1992). Moreover, it is the knowledge of the factual basis that starts the statute of limitations to run, not knowledge of the legal basis of the cause of action. *Id.* A plaintiff does not need to have "[a] smoking gun" to be required to file suit. *Beard v. King County*, 76 Wash. App. 863, 868 (Div. I, 1995). A plaintiff will be charged with constructive knowledge of what a reasonable inquiry would have disclosed. *Green*, 136 Wash. 2d at 96; *Hudson v. Condon*, 101 Wash. App. 866, 875 (Div. III, 2000).

Before and after the DOE disclosed documents on February 27, 1986 (along with its denial that emissions caused health risks), there was significant media coverage in Washington and Oregon. Frequently mentioned was the fact that the Hanford releases were many times larger than TMI and Chernobyl and that one emission, I-131 could cause thyroid cancer. Equally prevalent was the fact that health studies were needed to determine if the Hanford releases caused injuries as there was no proof of that fact and studies were in the planning stages, e.g., *Spokesman-Review*, 11/03/85 (state representative calls for state study on Hanford's impact on public health); *Spokesman-Review*, 11/16/85 (Washington State's Nuclear Waste Board will do investigation of downwinders' health);

Spokesman-Review, 04/0 1/86 (Representative Foley supports a congressional investigation of Hanford emissions); *Spokesman-Review*, 04/30/86 (CDC and Washington State are working together to estimate doses); Press Release *Washington Nuclear Waste Board*, 09/26/86 (Hanford Health Effects Panel [HHEP], a cooperative effort between the CDC and Washington State recommends health effects study and dose reconstruction); *Tri-City Herald*, 03/07/87 (Hanford Historical Document Review Committee [HHDRC] made up of state officials from Washington and Oregon recommended dose reconstruction as critical to determination of health effects); and *Seattle PI*, 04/09/87, 06/07/87; *Spokesman-Review*, 07/13/87 (The DOE agrees to fund a study on dose reconstruction).

Also common in the media reports was the assertion that the Hanford emissions did not or likely did not cause any health risks, e.g., *Oregonian*, 03/02/86 (DOE states that Hanford emissions presented no health risk); *Oregonian*, 03/12/86 (Washington and Oregon radiation specialists say that there was likely no problem from the Green Run in 1949); *Spokesman-Review*, 03/14/86 (Representative Foley doubts that the Green Run caused health problems); *Seattle PI*, 03/15/86 (DOE found no increase in illnesses in Hanford employees) (this study was repeatedly cited in the media); *Yakima Herald-Republic*, 03/16/86 (the DOE says there were no observable impacts on health); *Olympian*, 03/20/86 (Washington State epidemiologist Dr. Sam Millham found no unusual increase in cancer in the people near Hanford) (this study also was repeatedly cited in the media);

Yakima Herald-Republic, 04/02/86 (Benton County and Franklin County medical health director does not expect the studies to show any abnormal health effects); *Seattle PI*, 05/12/86 (Walla Walla physician states that the hospital has seen no increase in cancer); *Spokesman-Review*, 09/11/86 (Washington Office of Radiation Protection expects no real health hazards likely from whole body doses. Dose to thyroid might be enough to increase the incidence of thyroid cancer).

The Defendants argue that the Plaintiffs had no right to rely on any DOE denials. When a plaintiff has direct evidence to the contrary, he/she cannot reasonably rely on denials or wait for the defendants to admit causation. *Carey v. Kerr-McGee Chemical Corp.*, 999 F. Supp. 1109, 1116 (N.D. Ill. 1998). In numerous Washington cases, however, the courts have considered what effect a defendant's reassurance or third party's explanations regarding causation might have on a plaintiff. *Caughell v. Group Health*, 124 Wash. 2d 217, 238 (1994) (question of fact as to what effect an M.D.'s reassurance had on a patient s knowledge of medical malpractice claim); *Grumman*, 111 Wash. 2d at 324 (the fact that the investigation had ruled out mechanical defect was material to the question of the plaintiff's knowledge in a product liability case); *Price v. State*, 96 Wash. App. 604, 612, 617 (Div. II, 1999) (DSHS's reassurance that they had provided all records was a fact to be considered on when the parents had sufficient knowledge to bring a wrongful adoption action); *Lo v. Honda Motor Corp.*, 73 Wash. App. 448, 456 (Div. I, 1994) (M.D.'s explanation regarding causation reduced the patient's duty to

inquire when a child is born with severe disabilities). Here, not only the DOE but local, state and national leaders made reassuring statements and expressed doubt that the Hanford emissions had caused health problems. The statements were usually in conjunction with recommendations that more studies were needed.

Defendants argue that reasonable minds can reach but one conclusion and that is that the Plaintiffs with a diagnosis of thyroid cancer that predated August 6, 1987 (three years before suit filed), were on notice of facts in support of all of the elements of their claims by February 27, 1986, the time of the DOE document disclosures. Defendants assert that long before the HEDR technical oversight panel said that Hanford emissions were significant enough to cause serious risk of illness on July 11, 1990 (the date after which Plaintiffs filed their suit), that other evidence of radiation doses was available to Plaintiffs in the media, e.g., *Spokesman-Review*, 03/14/86 (the director of the Environmental Policy Institute [EPI] said that by releasing large amounts of radiation you put surrounding people at risk); *Spokesman-Review*, 05/03/86 (the EPI estimated that the 1944 through 1969 Hanford releases may have caused 90-140 thyroid cancers); *Oregonian*, 5/11/86 (after two months of its own study the newspaper reports on sources of potential I-131 exposure–milk and vegetation, and that risk is greatest for children); and *Yakima Herald-Republic*, 09/11/86 (Al Conklin of the Washington State Office of Radiation Protection said some residents got significant doses of radiation).

All the articles cited by the Defendants, however, indicate that the research findings were preliminary or dealt with potential doses. Moreover, all the articles discussed the fact that future studies would be conducted to answer the question definitively. Here, on Defendants' Summary Judgment Motion all facts must be construed in favor of the non-moving Plaintiffs and all justifiable inferences drawn in their favor. *Anderson*, 477 U.S. at 255. A justifiable inference could be drawn that even a plaintiff with a duty to inquire would have found on inquiry that the Hanford emissions were potentially dangerous but that the actual effect on health was disputed and that official studies of doses and thyroid disease were going to be conducted to give a more definitive answer. It is questionable whether a Plaintiff could have connected all of the dots, as Defendants assert, between his or her injury and Hanford emissions prior to August 7, 1987. Unlike the *Oak Ridge* plaintiffs, the Hanford Plaintiffs did not wait until final reports were available. *Ball*, ___ F.3d___, 2004 WL 1573172, *4.

The Court concludes that material questions of fact preclude summary judgment. *See Grumman*, 111 Wash. 2d at 319 (that a causal connection exists between the harm and the Defendants' acts or omissions is usually a question of fact); *Ohler v. Tacoma General Hosp.*, 92 Wash. 2d 507, 510 (1979) ("The correct formulation of the discovery rules poses a question of law, but the application of the rule presents a question of fact.") As to any given Plaintiff material questions of fact exist as to: (1) whether the Plaintiff's diagnosis, media reports and other lawsuits triggered a duty to inquire; and (2)

whether an inquiry would have revealed facts supporting all the elements of the Plaintiff's claim prior to August 6, 1987.

IV. ACCRUAL OF P-AA CLAIMS

As an alternative basis for denying the Defendants' Summary Judgment Motion the Plaintiffs argue that a cause of action could not accrue until the 1988 Amendments to the P-AA created those claims, i.e., no earlier than August 20, 1988. They argue that there are sound policy grounds for giving Plaintiffs whose claims were not yet extinguished the full benefit of the statutory period under the new provisions. Plaintiffs' argument is supported by *O'Donoghue v. State*, 66 Wash. 2d 787 (1965). There the court held that "the limitation of the new statute as applied to pre-existing causes of action commences when the cause of action is first subjected to the operation of the statute, unless the Legislature has otherwise provided." *Id.* at 792.

At oral argument Plaintiffs concede that this is an unexplored area of law. While it would support summary judgment for Plaintiffs, the Plaintiff s have not sought summary judgment on this rather unique theory. The Court is equally reluctant to rely on this as a basis for denying Defendants' Summary Judgment Motion.

V. TOLLING OF THE STATUTE OF LIMITATIONS WITH A CLASS ACTION

In *American Pipe & Constr. Co. v. Utah*, the Supreme Court established that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class

who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554 (1974).

> Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 354 (1983).

Here, the *Evanson* class action was filed August 6, 1990. On April 15, 1994, a joint motion was filed to certify a class action (Ct. Sec. 385). Judge McDonald entered a 96 page Order on September 22, 1994, addressing the Motion for Class Certification (Ct. Rec. 452). In the Order's introduction, the court twice notes that it is "reserving" on the Motion to Certify a Rule 23(b)(3) Opt-Out Class Action (Ct. Rec. 452 at p. 2). In both the introduction and the conclusion of the Order, the court states that it is not denying the Motion (Ct. Rec. 452 at pp. 2, 95). Finally, the Order provides

> Accordingly, **IT IS HEREBY ORDERED** that plaintiffs' motion to certify to this action under Rule 23(b)(3) is **RESERVED**. The issue and motion may be renewed by any party or by the court at a more appropriate time.
>
> **IT IS FURTHER ORDERED** that the sub-motion of the Hamilton, Criswell, and Jaros plaintiffs' groups to certify this as a mandatory class action under Rule 23(b)(1)(A), or a

mandatory issues class action under Rule 23(b)(1)(A) and 23(c)(4)(A) is **DENIED**.

Ct. Rec. 452 at pp. 95-96 (Defendants' Exhibit #29).

On remand the Ninth Circuit recognized that the class certification issue was still pending and said "[w]e recommend that the court resolve the pending motions for class certification as soon as possible . . . ." *In Re: Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1139 (9th Cir. 2002). At this Court's first case management conference after remand, the Court acknowledged the pending class certification motion. In its Order the Court stated that "Plaintiffs' counsel have advised the Court that all Motions for Class Certification are **WITHDRAWN**, including the Motion in *In Re: Hanford*, **CY-91-3015, Ct. Rec. 385**." Case Management Order No. 1, May 29-30, 2003, filed 6/03/03 (Ct. Rec. 1289), p. 9.

Based on the record, the Plaintiffs assert that the statute of limitations was tolled from the filing of the *Evanson* action on August 6, 1990, until they withdrew their Motion at the case management conference on May 29-30, 2003. In contrast, Defendants construe Judge McDonald's Order as a denial of class certification and assert that the statute of limitations was tolled only until September 22, 1994, when Judge McDonald entered the Order. Defendants cite *In Re: Copper Market Anti-Trust Litigation*, in support of their position. 300 F. Supp. 2d 805 (W.D. Wis. 2003). In that case, a lower court had denied class certification "without prejudice," *id.* at 810, while Judge McDonald specifically reserved on certification and the Motion remained pending.

There is no material question of fact on this issue. The Court may grant summary judgment for the Plaintiffs ruling as a matter of law that the *Evanson* filing on August 6, 1990, tolled the statute of limitations until May 30, 2003. *See Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1982) (court may grant summary judgment for non-moving party provided "moving party against whom summary judgment was rendered had a full and fair opportunity to ventilate the issues involved in the motion.); 10A CHARLES WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2720, pp. 345-52 (3d ed. 1998). Defendants had a full and fair opportunity to address the issue of tolling having raised it in their memorandum in support of the Summary Judgment Motion.

VI. CONCLUSION

Whether any Plaintiff in this case had a duty to inquire and would have discovered facts in support of all elements of his or her personal injury claim, especially causation, prior to August 6, 1987, presents material questions of fact that preclude summary judgment. Although the Plaintiffs' claims might not have accrued until August 20, 1988, when the Amendments Act to the P-AA became effective, the Court is not relying on this basis to deny Defendants' Summary Judgment Motion. Finally, the Court determines as a matter of law that the statute of limitations was tolled from August 6, 1990, when the *Evanson* class action was filed, to May 30, 2003, when the Motion for Class Certification was withdrawn. Summary judgment is granted to the Plaintiffs on this issue. Accordingly,

IT IS ORDERED that:

1. Defendants' Motion for Summary Judgment–Statute of Limitations, filed February 20, 2004, **Ct. Rec. 1433, is DENIED.**

2. The Court determines as a matter of law that the statute of limitations in this action was tolled from August 6, 1990, to May 30, 2003. Summary judgment is **GRANTED** to the Plaintiffs on this issue.

The District Court Executive is directed to file this Order and provide copies to Liaison Counsel; Mediator Gary Bloom; **AND TO** pro se Plaintiffs Noreen L. Wynne, Carmela M. Destito-Buttice (for late John P. Destito, Jr.), and Marylin F. Mlnarik.

DATED this 22nd day of July, 2004.

/s/
WM. FREMMING NIELSEN
SENIOR UNITED STATES
DISTRICT JUDGE